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No. 80-1640

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorizes the Nuclear Regulatory Commission to amend an operating license for a nuclear power plant without first holding a hearing if one has been requested, where the Commission determines that the amendment presents no significant hazards consideration.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of

* Petitioners in the court of appeals, respondents in this Court, were Steven Sholly, Donald Hossler and People Against Nuclear Energy. Respondents in the court of appeals were the United States Nuclear Regulatory Commission, its five member commissioners: John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford, and the United States. In this Court the United States and the Nuclear Regulatory Commission are petitioners. The individual commissioners have been omitted as petitioners because their inclusion would be superfluous. Intervenor-respondents in the court of appeals were Metropolitan Edison Co., Jersey Central Power & Light Co. and Pennsylvania Electric Co.

Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-27a) and the Statement on Denial of Rehearing En Banc by dissenting members of the court (App. B, *infra*, 28a-46a) are not yet published.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 47a-48a) was rendered on November 19, 1980. Timely petitions for rehearing and a suggestion for rehearing en banc were denied on March 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), provides in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be

affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT

This case arose on consolidated petitions for review of two orders of the Nuclear Regulatory Commission, issued June 12, 1980, pertaining to measures to be taken as part of the cleanup effort in the aftermath of the March 28, 1979, accident at Unit 2 of the Three Mile Island nuclear power plant in Pennsylvania (TMI-2). Specifically, the Commission issued (1) a "Memorandum and Order" (App. D, *infra*, 49a-61a) authorizing release of radioactive krypton-85 gas from the reactor containment building into the surrounding atmosphere and (2) an "Order for Temporary Modification of License" (App. E, *infra*, 62a-67a) which amended the TMI-2 operating license by temporarily replacing the then existing limits on releases of radioactive gases with new limits expressed in terms of actual radiation measured outside the plant, designed to provide equivalent health protection (App. A, *infra*, 6a-7a & nn.7, 8).

In the aftermath of the accident at the TMI-2 nuclear power plant, the Nuclear Regulatory Commission ("NRC") undertook a series of regulatory actions and environmental studies to guide and control

the cleanup process (see App. A, *infra*, 3a-8a & n.1, *infra*). One of the problems addressed was an accumulation of radioactive gas in the reactor containment building which inhibited maintenance and cleanup (App. A, *infra*, 3a). Alternative strategies for overcoming this problem were reviewed in an environmental assessment circulated for public comment beginning March 25, 1980. See 45 Fed. Reg. 20265 (1980). After consideration of public comment, the NRC issued a final environmental assessment, concluding that venting of the krypton-85 gas to the atmosphere was the best course of action. The NRC implemented that conclusion by issuing the "Memorandum and Order" (App. D, *infra*, 49a-61a) and "Order for Temporary Modification of License" (App. E, *infra*, 62a-67a) on June 12, 1980.

No hearing was held on either order prior to its issuance. The Commission believed that no hearing was required on the Memorandum and Order authorizing commencement of purging ("the venting order") because that order merely restored pre-existing license authority that had been suspended following the TMI-2 accident, and accordingly did not constitute an amendment to the TMI-2 operating license, subject to the hearing provisions of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a).[1] Under

[1] Inasmuch as the release of certain radioactive gases, such as krypton, is a normal part of the operation of a nuclear power reactor, the operating licenses of all nuclear power plants, including TMI-2, permit such release. In response to the March 1979 accident, however, after assuring that the TMI-2 reactor was in a safe and stable cooling condition, the NRC suspended the Metropolitan Edison Co.'s authority to operate TMI-2 and required that the plant remain shut down. 44 Fed. Reg. 45271 (1979). On February 11, 1980, NRC expressly prohibited venting of the reactor containment build-

the order, venting was not to begin for at least 10 days, so as to allow people who wanted to leave the vicinity an opportunity to do so.

As its caption implies, the second order affecting the TMI-2 cleanup issued by the Commission on June 12, 1980, the "Order for Temporary Modification of License," was treated as an amendment to the TMI-2 operating license by the Commission. However, the Commission found that the substitution of performance standards based directly on actual dosage, for the pre-existing limits in the TMI-2 license based on release rates designed to indirectly achieve the same level of protection, "involve[d] no significant hazards consideration" (App. E, *infra*, 65a). Accordingly, while noting that any interested person affected by the "Order for Temporary Modification of License" could request a hearing thereon, pursuant to 10 C.F.R. 2.714, the Commission provided that the license amendment would be effective immediately and that "[a] request for a hearing will not stay the effectiveness of this Order" (App. E, *infra*, 66a).

On June 16, 1980, the respondents, including interested citizens residing near the TMI-2 plant, requested that NRC reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. Having received no response by June 23, 1980, respondents filed a petition for review of the two June 12,

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ing until subsequently approved by the Commission. 45 Fed. Reg. 11282. The June 12 Memorandum and Order authorizing venting provided that approval, based upon the intervening environmental review, and the Commission's conclusion that venting could be carried out consistent with its statutory mandate to protect the health and safety of the public (App. D, *infra*, 57a-58a).

1980, orders.[2] The court of appeals denied emergency injunctive relief sought by respondents to forestall commencement of venting, on June 26, 1980. The next day, respondents lodged a request with NRC for a hearing on the two June 12 orders. That request was referred to an Atomic Safety and Licensing Board (ASLB) pursuant to 42 U.S.C. 2241. Venting actually began on June 28. On July 3, respondents moved the ASLB to suspend venting, but withdrew this request on July 8. The purging process was completed on July 10, 1980. (App. A, *infra*, 7a-8a.)

Proceedings continued in the court of appeals. The respondents there argued that: (1) the venting order improperly authorized venting of krypton to the atmosphere, (2) the Commission's decision that the license modification order entailed no significant safety questions was arbitrary, and (3) each of these orders had been issued without a prior hearing in violation of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a).[3] In response, the NRC and intervenors Metropolitan Edison Co., *et al.*, argued that: (1) the petitions for review had been mooted by completion of the venting process, there being little likelihood of repetition of the need for extraordinary venting at TMI-2, (2) the venting order was reasonable, consistent with applicable Commission regulations, and was not an amendment to the TMI-2 operating license, and (3) the temporary license modification had properly been determined to involve "no significant hazards consideration," and was properly

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[2] The Commission denied the request for reconsideration on June 26, 1980.

[3] A separate petition for review had been filed in the Third Circuit on July 8, 1980, and had been transferred to the D.C. Circuit and consolidated with the petition first filed there, upon the NRC's motion.

issued without offering or holding a prior hearing or giving prior notice of the action in the Federal Register, under the authority conferred by the last sentence of Section 189(a).[4]

The court of appeals reversed, holding that the final sentence of Section 189(a) of the Atomic Energy Act does not permit the Commission to dispense with a hearing prior to approval of a license amendment, even when the Commission determines that the amendment presents no significant hazards considerations, and that the provision in question authorizes only omission of some form of notice where a "no significant hazards consideration determination" is reached by the Commission (App. A, *infra*, 13a-22a). Concluding as well that the June 12 venting order was a license amendment subject to Section 189(a) (App. A, *infra*, 23a-25a), the court declared that NRC was required to hold a hearing prior to issuance of the venting order and the temporary license modi-

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[4] The United States, separately joined and represented as a respondent in the court of appeals pursuant to 42 U.S.C. 2239(b), 28 U.S.C. 2342(4), 28 U.S.C. 2344, and 28 U.S.C. 2348, argued that the question whether Section 189(a) permits the NRC to dispense with a prior hearing where the Commission determines that a license amendment entails "no significant hazards consideration" was capable of repetition, but would not generally evade review, and that this case was therefore moot. In addition, the United States suggested that the petitioners' withdrawal of their request for suspension of purging rendered the case moot. However, the United States agreed with the respondents that the last sentence of Section 189(a) does not permit the Commission to dispense with a hearing prior to approval of a license amendment if one is properly sought in a timely manner, notwithstanding a determination that "no significant hazards consideration" is presented by an amendment. The United States has reconsidered its position and accordingly now joins the Nuclear Regulatory Commission as a petitioner herein.

fication order (*id.* at 26a).[5] In support of its interpretation of the concluding sentence of Section 189(a), the court of appeals relied upon language in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924, 927 (D.C. Cir. 1973), while discounting a contrary statement in *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974), as unconsidered *dictum* (App. A, *infra*, 15a-16a & n.18). The court also concluded that the "plain language of section 189(a) dispels any notion that by a finding of 'no significant hazards consideration' the NRC may dispense with the hearing requirement" (App. A, *infra*, 16a). Support for this interpretation was adduced from the legislative history of 1962 amendments to Section 189(a) which added the penultimate sentence of that provision, while contrary legislative history proffered by the Commission was discounted (App. A, *infra*, 17a-22a). The court declined to defer to the Commission's interpretation of the statute, stating that the statute was unambiguously inconsistent with the Commission's view (*id.* at 21a-22a n.26).

The NRC and the intervenors petitioned the court of appeals for rehearing; the intervenors suggesting en banc reconsideration. The petitions and suggestion were rejected on March 4, 1981, with four members

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[5] The court of appeals rejected the petitioners' contentions that this case was moot, concluding that the issue presented was " 'capable of repetition, yet evading review' " (App. A, *infra*, 8a-13a) and that the respondents' withdrawal of their request for a stay of venting (see page 6), *supra*) did not prevent adjudication (App. A, *infra*, 26a n.28). The court of appeals also held, *sua sponte*, that the respondents' informal expressions of opposition to the venting plan constituted a timely request for a hearing prior to approval of any amendment to the TMI-2 license facilitating venting sufficient to trigger their statutory hearing rights under Section 189(a) App. A, *infra*, 21a n.25).

of the court dissenting from the denial of rehearing en banc, and urging reconsideration of the holding that NRC may not dispense with a prior hearing upon determining that a contemplated license amendment entails no significant hazards considerations (App. B, *infra*, 30a). Concluding that NRC's practice under its interpretation of Section 189(a) "complied fully with statutory mandates," and that the panel's opinion "ignored logic and distorted the legislative history of that section," the dissenting judges asserted that the panel's action "raises an issue of 'exceptional importance'" (App. B, *infra*, 34a, 36a & 30a, quoting Fed. R. App. P. 35(a)). Moreover, the dissenters suggested that "[u]nder the rubric of statutory interpretation, the panel has made a policy decision of major consequence" which by "reversing long-standing NRC policy * * * forces a major reallocation of Commission resources, which appears likely both to overwhelm the agency's hearing machinery and divert attention from safety issues of greater significance" (*id.* at 30a, 31a). The dissenters accordingly concluded that the panel's decision violates this Court's "unanimous mandate in *Vermont Yankee* rejecting judicial imposition of administrative procedures upon an agency in excess of the statutory minima prescribed by Congress" (*id.* at 31a).

The court of appeals stayed issuance of its mandate for a period of thirty days from the denial of rehearing pending filing of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This case presents a question of interpretation of the Atomic Energy Act of substantial practical importance.[6] The court of appeals' decision disregards

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[6] Petitioners seek only review of the court of appeals' holding that Section 189(a) does not permit the Commission

the key item of legislative history which demonstrates Congress' awareness, at the time it enacted the provision of Section 189(a) now in dispute, of the Commission's practice of dispensing with hearings on license amendments entailing "no significant hazards consideration," and that Congress intended to codify that practice when it enacted the 1962 amendments to the Atomic Energy Act. Not only does the decision below conflict with the intent of Congress, it fails to give appropriate weight to a longstanding agency interpretation of its governing statute, expressed in published decisions and regulations for twenty years. If permitted to stand, the court of appeals' decision will force a radical alteration in agency practices for regulating usage of nuclear energy, and may cause curtailment of nuclear power plant operation for reasons unrelated to any safety issue presented by nuclear power.

1.a. At least as early as 1960, the Atomic Energy Commission, predecessor to the NRC, adopted the position that it could dispense with a hearing prior to approving a license amendment determined to present "no significant hazards considerations." *General Electric Co. (Vallecitos Boiling Water Reactor)*, 1 A.E.C. 541, 543 (1960). With the encouragement of

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to dispense with a hearing prior to acting on a license amendment determined to involve no significant hazards considerations. Although the petitioners believe that the court of appeals' holding (App. A, *infra*, 23a-26a) that the separate Memorandum and Order authorizing venting was a license amendment subject to the provisions of Section 189(a) was erroneous, review is not sought of that conclusion in this petition. The latter aspect of the decision below rests in large part upon the court of appeals' characterization of the Commission's intention in prohibiting venting on February 11, 1980 (App. A, *infra*, 23a-25a; see note 1, *supra*), and lacks the general importance of the ruling which is the subject of this petition.

Congress, see Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*, Vol. I, 73 n.4 (Comm. Print 1961), the *Vallecitos* rule was codified at 10 C.F.R. 50.59 on June 9, 1962. 27 Fed. Reg. 5492-5493 (1962). These regulations provided, 10 C.F.R. 50.59(e)(2) (1963):

> If the Commission determines that the proposed change * * * does not present significant hazards considerations * * * it may authorize such change * * * without a prior public hearing * * *.

b. The legislative history of the 1962 amendments to the Atomic Energy Act demonstrates that Congress was aware of and approved this rule. The present text of Section 189(a), 42 U.S.C. 2239(a), consists of four sentences, the last of which is the subject of this petition. Only the first sentence of Section 189(a) was found in the Atomic Energy Act of 1954 as originally enacted. 68 Stat. 955-956. The balance was added by a 1962 amendment. 76 Stat. 409.[7] As the court of appeals recognized (App. A, *infra*, 17a-19a), the 1962 amendments relieved the Commission of the obligation to hold hearings on issuance of operating licenses and amendments to construction permits and operating licenses for nuclear power plants for which a construction permit has already been issued after a hearing, where no one seeks a hearing on the subsequent action. H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962).[8] However, contrary to the decision below, this was not the sole purpose or effect of the

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[7] An earlier version of the second sentence of Section 189(a), not material here, was added in 1957. 71 Stat. 579.

[8] The Senate and House reports are virtually identical, being the product of the Joint Committee on Atomic Energy.

1962 amendment to Section 189(a). Curtailment of the mandatory hearing procedure was effectuated by the addition of the second and third sentences of Section 189(a). The fourth sentence, however, had the separate effect of adopting the *Vallecitos* rule codified at 10 C.F.R. 50.59 (1963), as is indicated in the Joint Committee Report on the bill discussing the amendment to Section 189(a).

> [T]his section will eliminate the requirement for a mandatory hearing, except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of a hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents "no significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8 (emphasis added). Thus Congress expressly endorsed the Commission's regulation permitting it to omit hearings prior to acting on proposed license amendments which entail no significant hazards consideration.[9]

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[9] The court of appeals disregarded the language emphasized above, deleting it entirely from the excerpt of this passage reproduced in its opinion (App. A, *infra*, 19a). Other

2. Contrary to the court of appeals' statement, the result reached below is not required by the language of Section 189(a). As the court of appeals acknowledged, its conclusion that the authority to dispense with notice contained in the final sentence of Section 189(a) does not include authority to omit the corresponding hearing, renders the statute paradoxical, for "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" (App. A, *infra*, 16a-17a n.20). Whether or not individuals manage to learn of agency plans in time to seek a hearing without any formal notice or publication, and whether or not some independent provision of law might impose a notice requirement of some kind as the court of appeals suggested—questions not presented here—it may be doubted that Congress deliberately sought to discourage individuals from learning of agency action in time meaningfully to exercise the right to a hearing, where such a right exists. The only tenable reading of the final sentence of Section 189(a) is that no hearing is required prior to approval of a license amendment in circumstances where the Commission is

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legislative history cited by the court of appeals cannot overcome this plain indication of congressional intent to codify the Commission's practice. The court of appeals relied primarily on the fact that the primary avowed purpose of the 1962 amendments was to limit the mandatory hearing requirement (App. A, *infra*, 17a-19a). But this evidence does not establish that no other purpose was effectuated. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). Other statements cited by the court of appeals (App. A, *infra*, 21a-22a) appear to refer to the third sentence of Section 189(a) and, in any event, must give way to the more specific statement of congressional intent concerning the last sentence of the amended provision found in the Committee Reports.

authorized to dispense with notice of its plans to act: the obvious purpose of a notice requirement is to protect and make meaningful a right to a hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974).

3. The court of appeals erroneously failed to defer to the NRC's long-standing interpretation of Section 189(a). That interpretation, announced in *Vallecitos*, *supra*, and codified at 10 C.F.R. 50.59 (1963) prior to its endorsement in the 1962 amendment to the Atomic Energy Act, was reaffirmed shortly after adoption of the amendment. 10 C.F.R. 50.58(b), 27 Fed. Reg. 12186 (1962). And it has been a part of the agency's published regulations continuously, to this date. See 10 C.F.R. 50.58(b).[10] This "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" which was scrutinized and approved by Congress at its inception, commands particular deference. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[11]

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[10] Proposed regulations at 45 Fed. Reg. 20491 (1980) make explicit the Commission's willingness to entertain requests for an after-the-fact hearing on amendments determined not to present a significant hazards consideration. The court of appeals expressly noted its view that these regulations are *ultra vires* (App. A., *infra*, 22a n.26).

[11] The court of appeals' reliance upon *Brooks* v. *Atomic Energy Commission*, *supra*, 476 F.2d at 927, to the exclusion of *Union of Concerned Scientists* v. *Atomic Energy Commis-*

Unlike the Commission's "practical administrative construction" of the disputed statutory provision, to which the court of appeals was bound to give substantial weight, *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, the interpretation of Section 189(a) propounded by the court below would frustrate the purposes of the Atomic Energy Act by imposing substantial and novel administrative burdens on the Commission, which threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both (App. B, *infra*, 31a-34a). The Nuclear Regulatory Commission reports that it has approved more than 1600 amendments to nuclear power plant operating licenses which, it determined, entailed no significant hazards consideration, in the past four years. The annual average of more than 400 amendments per year reflects the detailed regulation of nuclear power plant operation carried out by the Commission. A nuclear power plant operating license, like that for the TMI-2 plant includes hundreds of pages of highly detailed technical specifications. Any change in any of the technical specifications requires an amendment to the operating license. 10 C.F.R. 50.59(a)(1), (c). Minor changes must be made frequently to accommodate routine events in the operation of a nuclear power plant. For instance, where a power plant is refueled, an event which occurs approximately every eighteen

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sion, supra, 499 F.2d at 1084 n.36, was unwarranted (see App. B, *infra*, 36a-38a). The applicable language in *Brooks* was at most an alternative holding, for there the court held that the Commission could not rely upon the last sentence of Section 189(a) as authority to omit a hearing, because the Commission had not determined that no significant hazards consideration was presented by the order at issue.

months, the technical specifications must usually be adjusted to reflect the slightly different behavior of the fresh fuel placed in the reactor core. The need for a variety of other minor license changes, such as amendments extending the time allowed for conducting tests, frequently arises.

Under the court of appeals' decision, each of these minor license amendments must be held in abeyance if a hearing is requested, notwithstanding the fact that the Commission reaches a written, reasoned, judicially-reviewable determination that the amendment entails no significant safety question. As a practical matter, it would be difficult, and in some cases impossible, for the Commission to provide a prior hearing in time to complete processing of all of the required license amendments presenting no significant hazards consideration before the changes must be implemented. The Commission informs us that in the past four months some twenty nuclear power plants would have had to shut down or operate at reduced power if they were not accorded in a timely fashion the authority sought in a license amendment which, the Commission concluded, presented no significant hazards consideration. Ironically, the decision of the court of appeals could interfere with implementation of a range of new operating license requirements developed by the Commission in response to the TMI-2 accident. Minor adjustments in such requirements, necessary to adapt those reforms to conditions at particular power plants, would have to be deferred pending a hearing, if one is requested, under the decision below. The court of appeals erred by failing to adopt the Commission's practical construction of Section 189(a) which permits interested parties to obtain a hearing after a license amendment entailing no significant hazards consideration has been approved.

Inasmuch as the Commission's practice was consistent with Congress' intentions in enacting Section 189(a) of the Atomic Energy Act, imposition of more exacting and burdensome requirements for administrative practice was impermissible. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip. op. 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1691

STEVEN SHOLLY and DONALD E. HOSSLER, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL. and UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, ET AL., INTERVENORS

No. 80-1783

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE, VICTOR GILINSKY, RICHARD T. KENNEDY, JOSEPH M. HENDRIE, and PETER A. BRADFORD, in Their Individual Capacities; and THE UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

No. 80-1784

IN RE: PEOPLE AGAINST NUCLEAR ENERGY,
PETITIONER

Petitions for Review of Orders of the
United States Nuclear Regulatory Commission
and for Writ of Mandamus

Argued September 8, 1980

Decided November 19, 1980

Before WRIGHT, *Chief Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion *per curiam*.

PER CURIAM: In this case petitioners seek review of two orders by the Nuclear Regulatory Commission (NRC) permitting the Metropolitan Edison Company to release radioactive gas into the atmosphere from the Three Mile Island nuclear plant.[1] The claim here is that the orders issued by the NRC were made effective without affording petitioners their statutory rights to notice and a hearing.[2]

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[1] Metropolitan Edison Co., Pennsylvania Electric Co., and Jersey Central Power and Light Co. jointly hold the operating license to the Three Mile Island nuclear plant. In this opinion they are called collectively either "the licensee" or "Metropolitan Edison."

[2] The petitioners primarily rely on § 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended

On June 26, 1980, this court denied petitioners' request for emergency injunctive relief to block the release of the radioactive gas. Now that the radioactive gas from the nuclear plant has been fully vented into the atmosphere, the petitioners seek only declaratory relief from this court.

I. BACKGROUND

This case arises in the aftermath of a widely publicized accident that occurred on March 28, 1979 at "Unit 2" of the Three Mile Island nuclear plant. As a result of the accident, dangerous concentrations of radioactive gas collected in the reactor containment building, inhibiting cleanup and maintenance work.

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in 1957, Pub. L. No. 85-256, § 7, 71 Stat. 579 (1957), and in 1962, Pub. L. No. 87-615, § 2, 76 Stat. 409 (1962). Section 189(a) reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit for a facility . . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

Three months after the accident, the NRC issued an "Order for Modification of License," 44 Fed. Reg. 45,271 (1979), suspending Metropolitan Edison's authority to operate Unit 2 of the Three Mile Island plant (TMI-2), and requiring it to "maintain the facility in a shutdown condition." *Id.*[3] The NRC order indicated that, in about thirty days, the Commission would issue a "Safety Evaluation" addressing "the imposition of new and/or revised Technical Specifications setting forth appropriate license conditions." *Id.*

In fact, the NRC issued no such evaluation. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67,738 (1979), which was to be an "overall study of the decontamination and disposal process." *Id.* The NRC Statement of Policy directed the agency's staff

> to include in the programmatic environmental impact statement on the decontamination and disposal of TMI-2 wastes an overall description of the planned activities and a schedule for their completion along with a discussion of alternatives considered and the rationale for choices made.

Id.

On February 11, 1980, the NRC issued another order, 45 Fed. Reg. 11,282 (1980), which stated that

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[3] Much of the factual basis for the NRC's actions is contained in its report, the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere" (May 1980), which is reprinted in the Intervenor-Respondents' Appendix (App.) 18.

> the facility's operating license should be modified so as to: . . . (3) Prohibit venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC, consistent with the Commission's Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement.

Id.[4]

Six weeks later the NRC published a notice of the "Availability of Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed. Reg. 20,265 (1980). The notice stated that the Assessment "considers five alternative methods for decontaminating the reactor building atmosphere and recommends that the building atmosphere be decontaminated by purging to the environment through the building's hydrogen control system." *Id.*[5] The NRC staff concluded in the Assessment that venting the gas into the at-

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[4] The February 11, 1980 order specified that any interested person or the licensee could request a hearing before March 21, 1980 on whether the proposed changes in the technical specification would be sufficient "to protect health and safety or to minimize danger to life and property" or "whether the provisions of this Order would significantly affect the quality of the human environment." *Id.* at 11,283. The order also provided, however, that a request for a hearing on part (3) of the order would not stay the effectiveness of the order. *Id.*

[5] The NRC desired to remove the radioactive gas from the reactor building so that workers could begin to clean the building, maintain the equipment, and prepare to remove the damaged fuel from the reactor core. Removing the radioactive gas from the reactor containment building was only the first step in an extensive cleanup.

mosphere would "not constitute a significant environmental impact and, accordingly, the staff does not propose to prepare a separate Environmental Impact Statement on this action." *Id.* at 20,265-66. Public comments on the Assessment originally were due by April 11, 1980, but the period was extended to May 16, 1980. 45 Fed. Reg. 30,760 (1980).

In May of 1980, the NRC issued the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere." On June 12, 1980, the NRC issued without a hearing two final orders, entitled "Order for Temporary Modification of License" and "Memorandum and Order," App. 119 and 125, respectively. The first order modified the operating license [6] to permit the licensee to release the radioactive gas from the reactor building at a faster rate than the existing specifications allowed.[7] The first order also expressly stated that, because the NRC had found that the modification of the operating license involves "no significant hazards consideration," requests for a hearing would not stay the implementation of the order. App. 121-23.[8] The second order authorized release

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[6] As part of its argument, the NRC contends that the second order, permitting purging, was not a license amendment. However, the NRC admits that the first order amended the TMI-2 operating license.

[7] Before the accident of March 28, 1979, the TMI-2 operating license authorized periodic release of specified amounts of radioactive gas into the atmosphere as a normal and necessary part of plant operations.

[8] Part of the basis for the Commission's determination of "no significant hazards consideration" was its conclusion that, although existing *release* rate limits would be exceeded, offsite dose limits would not be breached. Since the NRC's con-

of radioactive gas from the reactor building.[9] Venting was to begin on June 22.[10]

On June 16, petitioners wrote a letter to the NRC requesting that it reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. The NRC did not respond.

On June 23, petitioners filed a petition in this court for review of the two June 12 orders.[11] Three days later this court denied the petitioners' requests for emergency injunctive and declaratory relief. The next day, one day before the venting began, the petitioners filed a request for a hearing with the NRC on two June 12 orders. The hearing request was referred to an Atomic Safety and Licensing Board. On July 3, the petitioners moved the Board to suspend the venting, however, this request was subsequently with-

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cern was the effect of the venting on human health, the Commission felt that the more direct measure—off-site dose limits—would provide a satisfactory standard to determine the appropriate limits on the venting of the radioactive gas.

[9] The NRC made no finding that this order involved "no significant hazards consideration." *See* Brief for Respondent Nuclear Regulatory Commission at 30, 35.

[10] By making the orders effective immediately, the Commission failed to give any notice in the Federal Register of the license amendment. The Commission contends that so long as it makes a finding of "no significant hazards consideration," the governing statute does not impose such a notice requirement. *See* note 2 *supra* for statutory notice and hearing requirements.

[11] On July 8, 1980, a petition for review (No. 80-1783) and an accompanying petition for writ of mandamus (No. 80-1784) were filed in the Third Circuit. On the NRC's motion, those cases were transferred to this court and consolidated for review with No. 80-1691, the case originally filed in this court.

drawn, on July 8, shortly before the venting was completed.

Metropolitan Edison began to vent the reactor building on June 28, 1980, at a rate that was within the original license specifications for a normally operating reactor. On July 8, the licensee began to vent the radioactive gas at a faster rate, pursuant to the specifications set in the June 12 license amendment. The venting was completed on July 11. As the NRC had anticipated, the off-site doses from the venting were below the limits set in the June 12 radiation license amendment. In its draft Programmatic Environmental Report Statement, issued August 14, 1980, the Commission stated that it did not anticipate a recurrence of the purging of the reactor building atmosphere, but that some minor releases of gas might be necessary for data gathering purposes. *See* Brief for Respondent Nuclear Regulatory Commission at 6 n.4 & 20 n.11.

II. MOOTNESS

Because the licensee has completed the venting of the reactor containment building, and because both of the June 12 orders have expired, the Commission and the licensee claim that petitioners' claims for injunctive and declaratory relief are moot.[12] However,

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[12] Metropolitan Edison seems to argue that since petitioners' claims for injunctive relief are moot (i.e., the reactor building atmosphere has been purged), the case should be dismissed. This argument, however, misstates the nature of the relief sought by petitioners. They have sought *both* injunctive and declaratory relief in this action. Although petitioners cannot now obtain injunctive relief to prevent the purging, they continue to pursue their claim for a declaratory judgment that the NRC must grant them statutorily mandated notice and a hearing whenever it amends a license. *See, e.g., Super Tire*

because we find that these cases are "capable of repetition, yet evading review," [13] we hold that the petitioners' claims are justiciable in this court.[14]

The mootness doctrine is primarily based on article III of the United States Constitution, which limits federal court jurisdiction to "cases" or "controversies." Courts have interpreted the constitutional pro-

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Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) (the Court found that even though the strike had been settled, mooting injunctive relief, the petitioner alleged sufficient facts in support of declaratory relief so that the case should not be dismissed as moot).

[13] *See Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

[14] We note that the United States has taken the position that the petitioners' claims are "capable of repetition"—since the Commission has stated that it will continue to deny requested hearings when it finds no significant hazards considerations are involved—but that future claims will not evade review—since "there is no reason to believe that [NRC] actions will characteristically be irreversible." Memorandum of Respondent United States at 4. Consequently, the United States also argues that the petitions should be dismissed as moot.

We reject the Government's position for two reasons. First, as we explain in the text of the opinion, many NRC license amendments are irreversible. The facts in the present case illustrate how making an amendment effective immediately can preclude complete judicial review. Second, we believe that it is unreasonable for the Government to take the position that, in order to seek judicial review of a license amendment, a petitioner must race to the courthouse before the NRC takes an irreversible action. Even if a petitioner could file the petition before the NRC acted, a court more often than not will decline to grant emergency relief. Indeed, such a request for emergency relief was denied in this case. Consequently, because a petitioner will not receive complete judicial review of his claim, even though it might be meritorious, we find that these claims evade review.

vision to limit their jurisdiction to "a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). The case or controversy requirement "preserves the separation of powers" and " 'limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.' " *Tennessee Gas Pipeline Co.* v. *Federal Power Comm'n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)).

Cases arising from agency action, no less than cases involving only private parties, are subject to the mootness doctrine. Yet, as this court has recently noted, "the concept of mootness is placed under some strain in the context of administrative orders whose formal legal effect is typically shortlived." *Tennessee Gas Pipeline Co.* v. *Federal Power Comm'n*, 606 F.2d at 1379-80. The strain is relieved somewhat by an exception first articulated in *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498 (1911), where the Supreme Court held that technically moot cases are justiciable if they involve "short term orders, capable of repetition, yet evading review." *Id.* at 515.

A case is considered justiciable if "the litigant show[s] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974). As this case demonstrates, administrative orders, like labor disputes, often "do not last long enough for complete judicial review of the controversies they engender . . . . The judiciary

must not close the door to the resolution of the important questions these concrete disputes present." *Id.* at 126-27. Yet, in order to invoke the *Southern Pacific* exception, the petitioner must not only show that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration," he must also show that "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

The issue in the present case is not simply whether the NRC will again purge the reactor building atmosphere without first giving notice and holding a hearing. At stake is whether the NRC will continue its policy of making immediately effective license amendments without holding a hearing, even though petitioners request one, whenever the NRC finds that the amendment involves "no significant hazards consideration."

Under this view of the issues in this case, the conditions for avoiding dismissal on grounds of mootness, set forth in *Weinstein*, are met. The Commission has candidly conceded that

> at some point in the TMI-2 cleanup, perhaps on more than one occasion, the Commission will amend the utility's license in respects so minor that the Commission will think itself justified in making the amendment immediately effective based upon a no significant hazards consideration finding. Certainly, that kind of finding has been utilized in the past.

Brief for Respondent Nuclear Regulatory Commission at 23.[15] The Commission plainly intends to ad-

[15] This admission entirely undercuts Metropolitan Edison's argument that there is no evidence that the actions complained

here to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative; because the NRC policy will be carried out during the TMI-2 cleanup, there is a "reasonable expectation that the same complaining part[ies]" will be denied their alleged statutory rights to hearing and notice.

As the present case demonstrates, challenges to the NRC's policy of denying a hearing on license amendments may well escape review. The difficulty here is that the orders are often shortlived and the NRC actions, like venting, may be irreversible. The difficulty is compounded when the NRC elects, as in this case, to make its orders effective immediately. These considerations indicate that future challenges to the NRC policy may easily "evade review."

This court has stated that "[t]he situations [involving appellate consideration of recurrent controversies] are necessarily variant, and the variables complex. . . .[T]he court's decision to maintain the

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of will be repeated. In each of the cases cited in Metropolitan Edison's brief, the challenged governmental activity had ceased with no indication that it would be continued at a later time. *See, e.g., Murphy* v. *Benson*, 270 F.2d 419 (2d Cir. 1959), *cert. denied*, 362 U.S. 929 (1960). In the present case, by contrast, the NRC has clearly stated its intention to continue with its allegedly unlawful conduct—making certain license amendments effective immediately without holding a requested hearing or giving notice. We think it obvious that the NRC will also continue to rely on the second method employed in this case for avoiding the notice and hearing requirements of § 189(a)—describing an order as something other than a license amendment. *See* note 6 *supra*. The Commission's continued belief in its authority to follow this policy makes petitioners' challenge to the policy "capable of repetition." *See Nader* v. *Volpe*, 475 F.2d 916 (D.C. Cir. 1973).

appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence or continuation of what is perceived to be essentially the same legal dispute." *Alton & Southern Railway Co.* v. *International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 879 (D.C. Cir. 1972). "While an 'effective remedy' for the immediate dispute is not obligatory, there must be at least a capacity for a declaration of legal right concerning a future projection of the actual dispute that precipitated the litigation." *Id.* at 879-80. In the present case, that capacity exists, and we hold that this case is not moot.

III. The Order for Temporary Modification of License

The NRC issued without a hearing the "Order for Temporary Modification of License (OTML) of June 12, 1980, which substituted off-site dosage limits for release limits in the THI-2 operating license. The petitioners contend that the NRC's failure to provide a hearing violated section 189(a) of the Atomic Energy Act of 1954. The first sentence of that section provides in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The NRC and Metropolitan Edison do not dispute that the OTML constituted a license amendment sub-

ject to the terms of section 189(a). They do maintain, however, that under the fourth sentence of the section the Commission could dispense with a hearing. The fourth (and last) sentence of section 189(a) reads:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The NRC and the licensee argue that the NRC properly made a finding of "no significant hazards consideration" with respect to the OTML, and that consequently a hearing was not required. Although the last sentence of section 189(a) only explicitly "dispense[s] with . . . thirty days' notice and publication" upon a determination of "no significant hazards consideration," the NRC and the licensee contend that such a determination also permits the Commission to dispense with a hearing because notice and a hearing are inextricable.[16]

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[16] The petitioners, challenging the correctness of the "no significant hazards consideration" determination, also contend that the NRC was required under the third sentence of § 189(a) to provide 30 days' notice and publication in the Federal Register of the Commission's intent to issue the license amendment without a hearing. The third sentence provides that

> the Commission may, *in the absence of a request therefor* by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a

We are convinced that such a finding did not permit the NRC to dispense with a hearing that is otherwise required by section 189(a).[17] This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks* v. *Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court soundly rejected the contention that the fourth sentence in section 189(a) "indicate[d] Congressional intent to dispense with hearings in construction permit amendment proceedings . . . when the Commission determines that the amendment involves 'no significant hazards consideration.'" Instead this court, after an examination of the legislative history of section 189(a), held that the fourth sentence only dispenses with requirements of notice and publication. Because this circuit has previously rejected the very construction of section 189(a) offered by the NRC and the licensee,[18] the

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hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

(Emphasis added.) Since, however, we hold that the petitioners requested a hearing, *see* note 25 *infra*, and that the NRC was required to hold a hearing, we need not reach the question whether the Commission was required to provide 30 days' notice of its intent to issue the license amendment without a hearing.

[17] It is noteworthy that respondent United States concedes—indeed argues—that the NRC's failure to provide a hearing violated § 189(a) of the Atomic Energy Act. *See* Memorandum of Respondent United States at 4-21.

[18] It is true, of course, that 15 months after the *Brooks* decision this court stated in dictum in a footnote that "[a]n amendment can be made without opportunity for a hearing

doctrine of *stare decisis* compels us to hold that the NRC improperly failed to provide a hearing in the instant case.

Moreover, even if this court were not bound by *stare decisis*, we would still adopt the *Brooks* interpretation of the last sentence of section 189(a). The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication. Despite the plain, unambiguous language contained in the last sentence, the NRC and Metropolitan Edison suggest that the requirements of hearing and notice are so intertwined that the reference to notice in the fourth sentence must also comprehend a hearing. While it is true that requirements of notice and hearing are interrelated, it is clear that Congress was not merging them in section 189(a). That is demonstrated by the third sentence of the section where Congress made explicit reference to the hearing requirement.[19] That sentence plainly demonstrates that Congress did indeed intend to disentangle the two requirements of notice and hearing,[20] and "to lessen the mandatory

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if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists* v. *Atomic Energy Comm'n*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974). The court provided no support for its far-reaching statement, nor did it even make mention of the recently decided *Brooks* case, which had squarely *held* to the contrary on the basis of the legislative history of § 189(a). We accordingly decline to place any reliance on the dictum in *Union of Concerned Scientists*.

[19] For the text of the third sentence, *see* note 16 *supra*.

[20] We are cognizant of the fact that the plain meaning of the third and fourth sentences of § 189(a), when read together,

hearing requirement only when there was no request for a hearing." *Brooks* v. *Atomic Energy Comm'n*, 476 F.2d at 927.

A review of the legislative history of the 1962 amendments to section 189(a)—by which the last two sentences of the section were added—also firmly persuades us that the *Brooks* court properly construed the last sentence of section 189(a). That history demonstrates that the 1962 amendments to section 189(a) had their origin in congressional concern over a hearing requirement in *uncontested* cases—that is, when a hearing had not been requested.[21] Rep-

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produces in theory a somewhat paradoxical result. Under the fourth sentence the NRC may issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so, while under the third sentence the NRC need not provide a hearing when one has not been requested. As the NRC and the licensee note, it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice. This "paradoxical result" did not occur, however, in the instant case. Although petitioners did not formally request a hearing prior to issuance of the OTML, their prior expressions of interest constituted in effect a request for a hearing. *See* note 25 *infra*. It is also unclear whether the "paradoxical result" will ever in fact occur. As the NRC conceded at oral argument, there may be some type of notice requirement—although perhaps not 30 days' notice and publication in the Federal Register—implicit in the opportunity to seek judicial review of determinations of "no significant hazards consideration." Moreover, our decision today does not reach the question whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fourteenth Amendment or the Administrative Procedure Act notwithstanding a finding of "no significant hazards consideration."

[21] Indeed, counsel for Metropolitan Edison testified in 1961 before the Joint Committee on Atomic Energy and argued for

resentative of that concern was the statement by Raoul Berger, serving as an American Bar Association spokesperson, that

> 14 out of 15 of [the Atomic Energy Commission's] cases have been uncontested. And the central problem appears to be whether trial-type proceedings should be employed under sections 7 and 8 of the Administrative Procedures [*sic*] Act *in uncontested cases* . . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 64 (1962) (statement of Raoul Berger) (emphasis added).[22] *Accord, e.g., id.* at 32 (statement of Herzel H.E. Plaine, Chairman, Special Comm. on

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retention of a hearing requirement when a hearing has been requested:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirements of section 189(a), leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceedings.

Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge).

[22] In response the staff counsel to the Joint Committee noted:

> Mr. Berger, I think you are absolutely correct that the difficulty, the background that led to the Joint Committee study and the bills, was the concern over the handling by AEC of uncontested cases. . . .

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 70 (1962) (remarks of David Toll).

Atomic Energy Law, ABA). Thus an interpretation of section 189(a) that would permit the NRC to issue a *contested* license amendment without a hearing would enlarge section 189(a) beyond the scope originally intended.[23]

The 1962 Report of the Joint Committee on Atomic Energy also suggests that Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration":

> *In the absence of a request for a hearing*, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. . . .
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> . . . .
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> Finally, it is expected that *the authority given AEC to dispense with notice and publication* would be exercised with great care and only in

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[23] In support of its interpretation of § 189(a) the NRC quotes from a letter written in 1961 by former AEC Commissioner L.K. Olson to the Joint Committee on Atomic Energy, *reprinted in* Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 578-87 (Comm. Print 1961). The quoted portions of the letter suggest, in ambiguous terms, that the Commissioner was of the view that the AEC should be able to dispense with hearings on license amendments upon a finding that "no substantial new safety questions" are presented. *See* Reply Brief for Respondent Nuclear Regulatory Commission at 9. Even if Commissioner Olson intended his comments to apply to *contested* matters, it is clear from the rest of the legislative history that *Congress* did not share the Commissioner's view.

> those instances where the application presented no significant hazards consideration.

H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962) (emphasis added). And in a committee hearing one year prior, the Joint Committee on Atomic Energy had noted:

> When no substantial safety question is involved in . . . the amendment . . . the public interest would be protected by . . . publication of an apt notice in the Federal Register [24] and the giving of *an opportunity to any interested party to intervene*. . . .

Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., Improving the Regulatory Process, Vol. II, at 49-50 (Comm. Print 1961) (emphasis added). The language of the reports, consonant with the plain meaning of section 189(a), thus indicates that the section only permits the NRC to issue a

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[24] It is not entirely clear what the Committee meant by the phrase "publication of an apt notice in the Federal Register." Presumably it only refers to publication of the amendment *after the Commission has issued it.* This is not inconsistent with the fourth sentence of § 189(a), adopted in 1962, which dispenses with 30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing.

This ambiguity in the quoted language is not unique in the context of § 189(a). The text and legislative history of the section are replete with ambiguities and inconsistencies. *Cf.* note 20 *supra.* But there is no ambiguity in the legislative history or the text of § 189(a) with respect to the question before this court—whether a finding of "no significant hazards consideration" permits the NRC to dispense with a hearing.

license amendment without a hearing when there has been no hearing request.[25]

Statements by Representative Holifield, Chairman of the Joint Committee on Atomic Energy, and Senator Pastore, Vice-Chairman, on the floors of their respective houses further reinforce the language in the reports. Both individuals explicitly stated that the "amendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion." 108 Cong. Rec. 16,548 (1962) (remarks of Rep. Holifield); *see id.* at 15,746 (remarks of Sen. Pastore). The interpretation that the NRC and the public utilities press upon us,[26] however,

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[25] Whether petitioners did in fact request a hearing was not argued by the parties. While respondent United States suggests in a footnote that "[i]t is not wholly clear that petitioners did make such a request," Memorandum of Respondent United States 6 n.2, we are convinced that the petitioners requested a hearing. In *Brooks* v. *Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) (*per curiam*), this court held that expressions of interest may be sufficient to constitute a request for a hearing. In the instant case petitioners' continued interest in—and opposition to—the actions of the NRC at TMI-2 clearly constituted a request for a hearing. Indeed, the petitioners were among the many that submitted comments in April-May 1980 to the NRC regarding the Commission's Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere. *See* text at notes 5-6 *supra*.

[26] As part of their argument the NRC and the public utilities contend that the NRC, and the Atomic Energy Commission prior to the creation of the NRC, consistently interpreted the section as permitting license amendments to be issued without a hearing upon a finding of "no significant hazards

would "limit[] the right of an interested party to intervene and request a hearing."

In sum, we are confident that *Brooks* was properly decided and that it dictates the construction that must be attached to the last sentence of section 189(a). Because the NRC's finding of "no significant hazards consideration" did not entitle the Commission to dispense with a requested hearing prior to issuance of the OTML, we hold that its failure to provide a hearing violated section 189(a) of the Atomic Energy Act.

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consideration." *See* 10 C.F.R. § 2.105(a)(3) (1980); *id.* § 50.58(b); *id.* § 50.59(c) (1963); 45 Fed. Reg. 42,908 (1980); 45 Fed. Reg. 20,491-92 (1980); 43 Fed. Reg. 13,928 (1978); 41 Fed. Reg. 10,482-83 (1976); 40 Fed. Reg. 18,231 (1975); 39 Fed. Reg. 10,554 (1974); 39 Fed. Reg. 1,875-76 (1974); 27 Fed. Reg. 12,184 (1962); *Consumers Power Co.*, 7 A.E.C. 297 (1974); *General Electric Co.*, 1 A.E.C. 541 (1960). Even if the history of regulations and administrative practice by the AEC and the NRC were unambiguous—which we do not think it is—deference to the agencies' interpretations would be inappropriate in this case. As we have indicated, the statute and legislative history are in our view unambiguous: a finding of "no significant hazards consideration" does not permit the NRC to dispense with a hearing. As the Supreme Court has noted, "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

It is also worth noting that because of today's decision the NRC will not be able to put into effect a regulation proposed earlier this year that would explicitly permit the NRC to dispense with hearings on license amendments upon a finding of "no significant hazards consideration." *See* 45 Fed. Reg. 20,491-92 (1980). Such a regulation would be clearly inconsistent with the congressional mandate in § 189(a).

IV. The NRC's Memoradum and Order

The second order issued by the NRC on June 12, 1980, entitled "Memorandum and Order" (Venting Order), authorized Metropolitan Edison to vent the atmosphere of the reactor containment building. Respondents argue that section 189(a) did not require a hearing with respect to the Venting Order because the order was not a license amendment. We reject respondents' description of the order and find that section 189(a) was indeed applicable and, as a consequence, that petitioners were entitled to a hearing on the Venting Order.

Section 189(a), quoted in pertinent part in note 2 *supra*, requires that a hearing be given upon request "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a) (1976). Respondents maintain that because the Venting Order merely lifted a prior suspension of the licensee's authority to vent, and did not authorize release of a greater amount of radioactive gas than was permitted by the original technical specifications of the operating license, it was not a license amendment. However, on the facts here, this characterization of the Venting Order appears to be nothing more than an after-the-fact rationalization, which finds no support in the record of this case.

The NRC's July 20, 1979 "Order for Modification of License" suspended Metropolitan Edison's authority to operate TMI-2 and directed the licensee to "maintain the facility in a shutdown condition in accordance with the approved operating and contingency procedures." 44 Fed. Reg. 45,271 (1979). In a second order, dated February 11, 1980, the NRC recognized that TMI-2's operating license did not

permit venting as part of a cleanup operation because the license specifications pertained only to normal operation of the facility:

> [I]n the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for coping with foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by the Order of July 20, 1979. *These provisions are now simply inapplicable to the facility in its present post-accident condition.*

45 Fed. Reg. 11,282 (1980) (emphasis added). The NRC concluded that "the facility's operating license should be *modified* so as to: . . . [p]rohibit venting or purging . . . until . . . approved by the NRC." *Id.* (emphasis added).

There is no indication that this order was intended or perceived as a mere suspension of the licensee's existing authority to vent. In February 1980, it appeared that adequate venting of the reactor building might not be possible under the existing license authority. Consequently, the NRC acted to modify—and thus amend—the TMI-2 license in order to regulate the plant in an "off-normal" condition and to facilitate whatever venting scheme might be determined to be necessary. By its very terms, the February 11, 1980 order was a license amendment intended to reflect TMI-2's post-accident condition. Given that the original operating license was inapplicable, the NRC could not simply rely on its terms as authority for the venting. Authority for venting—

in this case the June 12 Venting Order—therefore had to come in the form of a license amendment.

The specific language of the June 12 Venting Order further corroborates our interpretation of that order as a license amendment. In the Venting Order, the NRC noted that TMI-2 was being operated according to the provisions of the February 11, 1980 order, *see* Venting Order at 10, *reprinted in* App. 134, and the Venting Order did nothing to change that. TMI-2's operating license was not simply "unsuspended" by the Venting Order. Instead, in the words of the NRC, "[i]n the present order we give the approval contemplated by [the February 11] restriction insofar as necessary for the licensee to conduct a purging of the TMI-2 containment." *Id.* at 11, *reprinted in* App. 135. Nowhere does the Venting Order support respondents' characterization of it as a reinstatement of some preexisting authority. Rather, the Venting Order appears as an amendment to the February 11 amendment to TMI-2's operating license. Because the June 12 Venting Order modified the February 11 order, and granted the licensee authority to do something that it otherwise could not have done under the existing license authority, the Venting Order was a license amendment within the scope of section 189(a).

Our reading of the Venting Order is also supported by Congress' intent in enacting section 189(a). By requiring a hearing upon request whenever a license is "grant[ed], suspend[ed], revok[ed], or amend[ed]," Congress apparently contemplated that interested parties would be able to intervene before any significant change in the operation of a nuclear facility. Whatever the Venting Order is called, it certainly was such a change.

As we held in Section III of this opinion, the NRC is required under section 189(a) to hold a hearing on a license amendment whenever interested parties request one.[27] Petitioners did so in this case, *see* note 25 *supra*, and the NRC therefore acted unlawfully in refusing to hold a hearing on the Venting Order.[28]

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[27] We note that the NRC and the public utilities briefly argued that a full adjudicatory hearing was not required here. *See* Brief for Respondent Nuclear Regulatory Commission at 32-34; Brief for Intervenor-Respondents at 44-45. Because this question was not fully briefed and argued by the parties, we express no opinion on the precise nature of the hearing required by § 189(a).

[28] Respondent United States argued that petitioners requested a hearing, as provided for in the OTML, and then failed to exhaust their administrative remedies by withdrawing their motion. The intended scope of that hearing and the facts surrounding the withdrawal are somewhat muddled by the record. What is clear, however, is that the offer of a hearing was made only in the OTML and not in the Venting Order. Presumably, then, petitioners would have been able to challenge only the license amendment substituting off-site dosage limits for release limits and not the actual decision to vent. Moreover, any hearing was to revolve around the issues whether the license amendment was in the public interest and whether it should be sustained. *See* App. 123. It appears from this description that petitioners would not have been permitted to raise their arguments regarding the NRC's interpretation of § 189(a), which formed the basis of the suit. Finally, the Commission specifically provided that a request for a hearing would not stay the effectiveness of the order. *See id.* But § 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement. For all these reasons, the remedy that petitioners allegedly failed to exhaust was an inadequate one and therefore need not have been pursued. *See McNeese* v. *Board of Educ.*, 373 U.S. 668, 674-76 (1963); *Union Pac. R.R. Co.* v. *Board of County Comm'rs*, 247 U.S. 282 (1918).

V. CONCLUSION

Because the NRC's actions in this case are "capable of repetition yet, evading review," the issues presented by petitioners are not moot. We hold that under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one. Finally, we hold that the June 12 Venting Order, which authorized the NRC to release radioactive gas from the disabled nuclear reactor, was a license amendment subject to the hearing requirements of section 189(a). Because the petitioners requested a hearing on the two June 12 license amendments, they were entitled to a hearing under section 189(a). The NRC's refusal to hold a hearing violated the petitioner's statutory rights.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1691

STEVEN SHOLLY and DONALD E. HOSSLER,
PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL. and UNITED STATES OF AMERICA,
RESPONDENTS

METROPOLITAN EDISON COMPANY, ET AL.,
INTERVENORS

No. 80-1783

PEOPLE AGAINST NUCLEAR ENERGY,
PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE, VICTOR GILINSKY, RICHARD T. KENNEDY, JOSEPH M. HENDRIE, and PETER A. BRADFORD, in Their Individual Capacities; and THE UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

No. 80-1784

In Re:

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

ON SUGGESTION FOR REHEARING EN BANC

FILED 4 MARCH 1981

Before: McGOWAN, *Chief Judge*, WRIGHT, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* of the Public Utilities has been circulated to the full court and a majority of the court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the suggestion of the Public Utilities is denied.

Per Curiam

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant rehearing *en banc.* Their statement is attached.

STATEMENT ON DENIAL OF REHEARING EN BANC

TAMM, MACKINNON, ROBB and WILKEY, *Circuit Judges*: We would grant a rehearing *en banc* in *Sholly, et al.* v. *United States Nuclear Regulatory Commission, et al.*, No. 80-1691 (D.C. Cir. 19 Nov. 1980) to review the startling proposition found within that opinion: that even when the Nuclear Regulatory Commission (NRC) has expressly found that a proposed amendment to an existing nuclear power plant operating license poses "*no significant hazards*" to human health or safety, the Nuclear Regulatory Commission is nevertheless *required* to provide a pre-amendment hearing to anyone who has expressed "continued interest in—and opposition to" its actions on related matters. Slip op. at 19 n.25.[1]

The panel's action raises an issue of "exceptional importance." Fed. R. App. P. 35(a). Under the rubric of statutory interpretation, the panel has made a policy decision of major consequence. The panel has read into section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended, the requirement that even notwithstanding a finding of "no significant hazards consideration" in a proposed license amendment, the NRC must nonetheless hold a *prior hearing* on the proposed amendment upon request of any interested person. By then drastically loosening the standard for what constitutes a "request" for a hearing, the panel has thrust upon the NRC the burden of holding full-fledged hearings before even the most trivial amendments to NRC operating licenses may be adopted.

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[1] We would only have this court reconsider pages 12-21 of the panel opinion, where this proposition is set forth.

We believe that the panel's inflexible blanket rule violates the Supreme Court's unanimous mandate in *Vermont Yankee* rejecting judicial imposition of administrative procedures upon an agency in excess of the statutory minima prescribed by Congress. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978). Furthermore, by reversing long-standing NRC policy, the panel's decision forces a major reallocation of Commission resources, which appears likely both to overwhelm the agency's hearing machinery and to divert staff attention from safety issues of greater significance. Finally, the panel decision threatens to result in the closing—for as much as nine months—of numerous power plants currently awaiting license amendments pending completion of hearings, when *post hoc* hearings might in fact be more than adequate to ventilate any health and safety issues posed by most amendments.

The license amendment in this case—a temporary modification of the Three Mile Island nuclear power plant's operating license to permit post-accident release of radioactive gas from the reactor building at rates exceeding existing specifications—was atypical among NRC operating license amendments.[2] Only a

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[2] The peculiar circumstances under which the *Sholly* appeal arose made this case particularly inappropriate for judicial articulation of sweeping procedural rules. In the aftermath of the widely publicized Three Mile Island incident, the NRC had suspended the licensee's authority to operate the stricken plant, requiring that the facility be maintained in a shutdown condition. Slip op. at 4. Before the accident, the plant's operating license had expressly authorized periodic release of specified amounts of radioactive gas into the atmosphere as part of the plant's normal and necessary operations. *Id.* at 6 n.7. Because the incident had caused "dangerous concentrations of radioactive gas [to] collect[ ] within [the

tiny fraction of all license amendments involve emergency matters so subject to factual dispute as the

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power plant's] reactor containment building, inhibiting clean-up and maintenance work," *id.* at 4, the NRC proceeded to prepare an overall study of the environmental impacts likely to result from decontamination and disposal of wastes resulting from the incident. In the meantime the Commission modified the facility's operating licence to prohibit *any* venting or purging of the reactor building atmosphere pending explicit future approval. *Id.* at 5.

Almost a year after the incident, after extensive environmental assessment and after concluding that release of gas from the plant would not constitute a significant environmental impact, the Commission tentatively recommended that the reactor building atmosphere be decontaminated by venting the gas through the building's hydrogen control system. *Id.* at 5-6. On 12 June 1980 the NRC modified the plant's operating license to permit the licensee to vent the gas from the reactor building at a rate faster than allowed by existing specifications, based on its explicit finding that offsite radioactive *dose* limits would not be breached if the gas were vented at a rate in excess of existing *release* rate limits. *Id.* at 6 & n.8.

The Commission further expressly found that modification of the operating license would involve "no significant hazards consideration." *Id.* at 6. The petitioners who later challenged the NRC's decision not to provide a hearing on that modification did not file a request for a hearing until the day before venting was to begin. *Id.* at 7. When venting finally began, release proceeded at first at a rate within the levels previously specified for normally operating reactors. *Id.* During this period petitioners moved to suspend the venting but then subsequently withdrew their request on 8 July. On the same day as the request was withdrawn, the licensee began to vent gas at the faster rate permitted by the 12 June license amendment. Venting was completed in three days, producing offsite doses well under the expected limits; shortly thereafter the 12 June venting orders expired. The Commission has asserted, and petitioners have not controverted, that any future purging of the Three Mile Island reactor atmosphere will be at worst minor and sporadic. *Id.* at 8.

hazards attendant to venting radioactive gas into the atmosphere. The Commission acts on an average of more than 400 license amendments per year. NRC's Motion to Stay Issuance of Mandate at 3. For the seventy-one power reactors currently licensed for operation, some 800 license amendment actions are presently before the Commission. The vast bulk of these concern matters such as: changing or adding to the myriad Technical Specifications embedded in a given power plant's 400-page operating license, detailing a plant's operating conditions, modifying surveillance requirements, administrative controls, design features or the like. Affidavit of Roger S. Boyd, Former Director of the Division of Project Management, NRC Office of Nuclear Reactor Regulation at 3, *attached to* Intervenor-Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc [Boyd Affidavit].

The NRC staff completes review of some fifty of these amendments per month; typically, it refuses to make a finding of "no significant hazards consideration" in a proposed amendment unless (1) the proposed change raises no significant new safety information of a type not previously considered in prior safety reviews, (2) the change raises no significant increase in the probability or consequences of an accident, or (3) the change offers no significant decrease in the plant's safety margin. *Id.* at 3-4. Over the past four calendar years, the NRC has published notice in the *Federal Register of more than 1500 amendments* to operating plant licenses which the NRC staff found to have "no significant hazards considerations." *Id.* at 4. The NRC has recognized that delay in issuance of license amendments would require plant shutdown if agency review is not expeditiously

completed.[3] Moreover, plants already shutdown for refueling or other reasons cannot restart until such review is completed. Thus NRC, practice and regulations have long called for approval of license amendments without hearing upon a finding of no significant hazards, accompanied by post-approval publication of notice in the *Federal Register*.[4]

We believe that the agency's past practice complied fully with statutory mandates. Whether or not a finding of "no significant hazards consideration" has been made, no hearing is required under the applicable language of section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1976), unless a hearing has first been specifically requested. The first sentence of section 189(a) only requires the NRC to grant a hearing on a license amendment proposal "*upon the request* of any person whose interest may be affected by the proceeding." (Emphasis added.) The third sentence, however, permits the NRC "*in the absence* of a request therefor by" such a person to issue an amendment without a hearing, "upon thirty days' notice and publication once in the Federal Register of its intent to do so." (Emhasis added.) Without mentioning hearings, the fourth sentence then specifies that the Commission may even dispense with such "thirty days' notice and publication . . . upon a

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[3] The former Director of the NRC's Division of Project Management estimates that there are about 50 license amendment applications now pending before the NRC which are likely to be classified as having "no significant hazards considerations" and which, if not approved within the next few months, will result in the shutdown of the reactor involved. Boyd Affidavit at 5.

[4] *Id.* at 6.

determination by the Commission that the amendment involves no significant hazards consideration."[5]

The *Sholly* panel read this language to conclude that the agency has for years in fact been operating in violation of section 189(a). The panel first argued that this court had previously held in *Brooks* v. *Atomic Energy Comm'n*, 476 F.2d 924, 926 (D.C. Cir. 1973) "that the fourth sentence [of section 189 (a)] only dispenses with requirements of notice and publication," *not* the requirement of a hearing. Slip op. at 14. Furthermore, the panel then independently read the statutory language to require the same conclusion, finding that because the fourth sentence of section 189(a) refers only to thirty days' notice and publication, it "plainly demonstrates that Congress

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[5] Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (1976), as amended in 1957, Pub. L. No. 85-256, § 7, 71 Stat. 579 (1957), and in 1962, Pub. L. No. 87-615, § 2, 76 Stat. 409 (1962), reads in pertinent part as follows:

> In any proceeding, under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Comission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit for a facility . . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

did . . . intend to disentangle the two requirements of notice and hearing." Slip op. at 15. The legislative history of the 1962 amendments to section 189 (a), the panel concluded, demonstrates that "Congress perceived the changes to section 189(a) as permitting the NRC to dispense only with notice and publication—not a hearing—upon a finding of "no significant hazards consideration." *Id.* at 18.

We believe that the panel unjustifiably relied on this court's brief *per curiam* opinion in *Brooks* to support its central proposition. We further believe that the panel's independent interpretation of the relevant language in section 189(a) ignored logic and distorted the legislative history of that section.

In *Brooks* two utility companies petitioned the Atomic Energy Commission to modify the provisional construction permits for two nuclear power plant units in order to extend the "latest completion date" specified in the permits. Petitioners, persons living near the proposed construction site, had earlier filed a timely request for a hearing with respect to two issues: whether the provisional construction permits should be modified to protect environmental values in accordance with NEPA and whether operating licenses for those facilities should issue. 476 F.2d at 925-26. The Commission gave petitioners notice that a hearing would be held on the second matter, "but inexplicably failed" to give notice that the proceedings would also permit discussion of the first issue: modification of the construction permits. *Id.* at 926 & n.6.

In ordering a hearing on the issue of extension of permit completion dates, the court made two points. Noting that the Commission's order summarily extending those dates had given "no indication whatso-

ever that the amendment involved no significant hazards consideration," the court stated "the Commission must surely make the required significant hazards determination, and note such determination in its order, if it intends to put forward such determination as the basis for its denial of a hearing." *Id.* at 926. Second, the court stated that because petitioners had made an undeniable request for a hearing on modification of permits, the Commission had erred in issuing the order without *notice* that the hearing scheduled to take place would also concern permit modification.

We believe *Brooks* to be plainly inapposite here. The *Brooks* court was addressing two questions not before the *Sholly* panel: whether the Commission could dispense with a hearing without first making a finding of no significant hazards, and whether the Commission could dispense with the notice statutorily required *in the third sentence of section 189(a)* when a clear request for a hearing has been made. The *Brooks* court plainly did not seek to lay down the broad rule which the panel here articulates: that the fourth sentence of section 189(a) requires a hearing even when the Commission has made a "no significant hazards consideration" finding. If that rule has indeed been the law of this Circuit since *Brooks*, it comes as a great surprise to us. At least one member of this court, addressing the proposition directly in a case decided after *Brooks*, stated the view that "[a]n amendment can be made without opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'" *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974) (McGowan, J.). Furthermore, some thirteen NRC regulations and cases listed within the panel opinion, but summarily dismissed there, indi-

cate that both before *and after Brooks* the NRC consistently interpreted section 189(a) to permit issuance of license amendments even without hearings upon a finding of "no significant hazards consideration." Slip op. at 20 n.26.

The panel buttresses its puzzling statutory construction with citation from a legislative history which it concedes to be "replete with ambiguities and inconsistencies." Slip op. at 18-19 n.24. We would submit that the confusion inherent within that legislative history is alone sufficient reason why it should not have been cited selectively in support of the panel's sweeping rule. While the panel holds that the NRC's "no significant hazards consideration" finding did not entitle the Commission to dispense with a hearing *prior* to the license amendment, slip op. at 20, *none* of the legislative history cited supports the notion that Congress intended to require a *prior* hearing.[6] Furthermore, although the panel

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[6] *See, e.g.*, the remarks of Representative Holifield and Senator Pastore cited in the panel opinion at p. 19: "[A]mendment [to section 189(a)] in no way limits the right of an interested party to intervene and request a hearing at *some later stage . . .*" (Emphasis added).

Even if petitioners sought to bottom their right to a prior hearing on due process grounds, rather than on the language of section 189(a), *cf.* slip op. at 15-16 n. 20, *discussed in* note 9 *infra*, it is not clear why in most license amendment cases that right could not be accommodated "at a meaningful time and in a meaningful manner" by a *post*-amendment hearing. *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 348-49 (1976). Intervenor-Respondents have suggested that in the vast majority of license amendment cases involving no significant hazards considerations, opportunity for a hearing *after* the amendment has issued would still allow full consideration of all issues involved without endangering plant safety or interfering with normal plant operations. *See* Intervenor-

rejects Judge McGowan's unambiguous statement in *Union of Concerned Scientists* as dictum, its subsequent analysis of the legislative history of the 1962 amendments to section 189(a) makes no mention of the broad and careful statutory analysis of those amendments which lay at the heart of Judge McGowan's well-reasoned opinion.[7]

Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc at 12. *See also* Boyd Affidavit at 5; note 11 *infra*.

Certainly the panel could have reached its result without disrupting the Commission's prevailing practice of dispensing with prior hearings on trivial license amendments involving no significant hazards, simply by adopting the type of balancing test previously approved by this court in *Union of Concerned Scientists*:

> [A]dministrative action taken prior to a full hearing has always been permissible when the state's interest in acting promptly to promote the general welfare, including economic well-being, *outweighs the individual's interest in having an opportunity to be heard before the state acts*, perhaps in error, in ways that may cause him significant injury.

Union of Concerned Scientists v. *AEC*, 499 F.2d 1069, 1081 (D.C. Cir. 1974) (emphasis added). This principle allows the decision whether or not to grant a prior hearing to be based on the facts of the individual case, rather than upon a pronouncement as broad as the one made here.

[7] Ironically the panel rejects Judge McGowan's statement as dictum because "[t]he court provided no support for its far-reaching statement, nor did it even make mention of the recently decided *Brooks* case," a case which we believe to be inapposite. Slip op. at 14 n.18. Yet the panel's subsequent analysis of the legislative history of the statutory language at issue ignored both the general thrust as well as the express language of Judge McGowan's opinion.

In *Union of Concerned Scientists*, Judge McGowan read the Atomic Energy Act to "erect [ ] a regulatory scheme vir-

The panel's reading of the statute and legislative history becomes even more remarkable when combined with its extraordinarily broad conception of what constitutes a request for a hearing, slip. op. at 19 n.25. Reading *Brooks* to hold "that expressions of interest may be sufficient to constitute a request for a hearing," the panel then finds that "petitioners' continued interest in—and opposition to—the actions of the NRC at TMI-2 clearly constituted a request

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tually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives," 499 F.2d at 1077, *citing Siegel* v. *AEC*, 400 F.2d 778, 783 (1968). The legislative goal of the 1962 amendments, he noted, was to eliminate the kind of unnecessary procedures imposed here: "[T]he primary purpose of the 1962 amendments [was] to unburden the Commission by authorizing it to . . . *remov*[*e*] *the necessity of holding unnecessary and duplicative hearings.*" 499 F.2d at 1077 (D.C. Cir. 1974) (emphasis added).

Furthermore, Judge McGowan expressed a marked lack of sympathy with petitioners' "fundamental misunderstanding of the AEC licensing process," suggesting that in cases like this one Congress did not intend to give the public an unequivocal right to participation:

> The role of the A[tomic] S[afety] L[icensing] B[oard] is not to compile a record; it is to review a record already compiled by the Staff and A[dvisory] C[ommittee on] R[eactor] S[afeguards], who have responsibility for the sufficiency of that record. . . . In the Atomic Energy Act . . . [Congress] authorized the Commission, in its discretion, to determine that certain applications present no "significant hazards considerations" and to dispense with notice and publication of impending approval, *excluding the public altogether.*

Id. at 1078 (emphasis added).

for a hearing." [8] By finding such facts to constitute a hearing request, the *per curiam* opinion has virtually read out of the statute the requirement that a hearing be requested. Yet the statutory language leaves no doubt that the NRC has no statutory duty to provide hearings on license amendments when none are requested. Furthermore, as the panel recognized, slip op. at 15 n.20, the statute expressly authorizes the NRC to dispense with thirty days' notice and publication, *even if an express request for a hearing is made*, so long as the NRC has made the requisite finding of "no significant hazards consideration."

We submit that the panel's interpretation of section 189(a), taken as a whole, renders it virtually impossible for the NRC faithfully to follow the explicit congressional directives found within that section. The panel has, in effect, eviscerated the congressional mandate found in both the third and fourth sentences of section 189(a). Since under the panel's standard almost any expression of interest constitutes a "request," the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment, despite the fact that Congress authorized it to do so in sentence three. Since the panel recognizes that it is absurd to hold a hearing without first providing notice to interested persons,[9] the NRC will never be

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[8] Slip op. at 19 n.25. The panel finds the fact that "petitioners were among the many that submitted comments in April-May 1980" to the NRC regarding the NRC's Environmental Assessment of the plant's decontamination somehow to buttress its finding of an individual hearing request. *Id.*

[9] The panel opinion requires that even when there is an undisputed finding of no significant hazards, clearly permitting the Commission to dispense with the 30 days' notice and publication statutorily prerequisite to a hearing, that a hearing must be held nonetheless, even *without* notice or publication

able safely to dispense with the publication even when a routine amendment undisputedly involves no significant hazards considerations, despite the fact that Congress authorized it to do so in sentence four.[10]

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to anyone who has a continuing interest in the matter. While acknowledging that this result is "paradoxical," slip op. at 15-16 n.20, the panel implies that such a result might never come about because the due process clause of the Fifth Amendment or the Administrative Procedure Act may mandate that the Commission give interested persons *some form* of notice and publication prior to amending a license, *even if the statute expressly authorizes it to dispense with thirty days' notice and publication. Id.* If the panel meant to imply by this tantalizing suggestion that notice and publication were in fact constitutionally required in this case, we believe it should have made that point explicitly so that that finding could properly have been the subject of further review.

This repeated evasive tactic by some panels of this court has not gone unnoticed. *See, e.g.*, Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 372 (criticizing this court's tendency to render decisions which are *de facto* unreviewable):

> [T]he most important factor leading to the *de facto* unreviewability of the D.C. Circuit's positions is the failure of that Court itself to facilitate review, even when the most fundamental issues are at stake. Or to put the point more critically: The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit's [hybrid rulemaking principles] . . . so clearly and authoritatively emerged had the effect, if not the purpose of assuring compliance below while avoiding accountability above.

[10] Even if the Commission makes an uncontested finding that no significant hazards will result from a license amendment, must it nevertheless hold a hearing on that amendment for anyone who has previously expressed interest in or opposition to the NRC in related matters in the past, so long as that person continues to express *some* interest? Despite the

Finally, while we believe the question deserves further briefing, we are also troubled by the clear indications in the opinion that the panel stretched to lay down a blanket rule for *all* cases in a case that was arguably moot [11] and whose facts were unique and, at points, ambiguous. The parties have suggested that

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fact that the Commission is statutorily authorized to dispense with thirty days' notice and publication in such a case, is it nevertheless required, *sua sponte*, to contact anyone who has submitted a comment about a relevant rulemaking in the preceding months to see if that person would like a hearing?

[11] Although we do not specifically challenge the panel's finding of mootness, slip op. at 8-12, we express some doubt that the issue which the panel chose to resolve was truly one both "capable of repetition, *yet evading review.*" *Southern Pac. Term Corp.* v. *ICC*, 219 U.S. 498, 515 (1911) (emphasis added). The Department of Justice, the Commission, and intervenors all convincingly argued that although the question decided here—whether the NRC is required to hold a hearing before issuing a license amendment based on a finding of "no significant hazards"—may well recur in the future, it is unlikely to evade review. *See* Memorandum of Respondent United States of America at 4 ("[T]here is no reason to believe that [the NRC's] actions will characteristically be irreversible."); Brief for Respondent Nuclear Regulatory Commission at 19-25. *See also* Intervenor-Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc at 12:

> The vast majority of operating license amendments—and particularly those involving no significant hazards consideration—are reversible. Changes such as shortened surveillance intervals can be lengthened; revised calculational techniques can be replaced with the prior methods. . . . In this respect, the amendment facilitating krypton venting from Three Mile Island Unit 2 was truly exceptional in that once released the krypton could not be reclaimed. Even in cases where "irreversible action" is involved, a subsequent hearing would still have the salutory [sic] effect of assuring thorough NRC consideration.

the panel erred not only in summarily finding that a proper request for a hearing had been made, but also in finding that such a request, even if made, had not later been withdrawn.[12] At a minimum, we would have the parties brief and argue these questions as a prerequisite to determining whether the panel's broad ruling was in fact necessary to its disposition of the case.

A number of judges and commentators have leveled criticism at this court for its continuing unwillingness to be guided by the Supreme Court's unequivocal directive in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) (reversing *NRDC* v. *NRC*, 547 F.2d 633 (D.C. Cir. 1976), and remanding to this court for a determination of adequacy of the record).[13]

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[12] *See* Memorandum of Respondent United States of America at 22:

> At the ASLB hearing, . . . petitioner Sholly had an opportunity to press his claim that § 189(a) entitled him to such a hearing; he could have attempted to convince the ASLB that the license amendment was invalid because the Commission had not granted a prior hearing. Instead of attempting to do so, he "formally withdrew" his motion to stop the release of radioactive krypton pending the outcome of the hearing. . . . *He refused to go forward with the hearing.* In this way the Commission was deprived of an early opportunity to correct its error. . . . This is a further reason for believing that the petition is moot. . . .

(Emphasis added.)

[13] *See, e.g.*, Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 345 (*Vermont Yankee* brought "into question the willingness of the D.C. Circuit to be guided by the Supreme Court"); Friendly, *Book Review*, 8 HOFSTRA L. REV. 471, 481 (1980)

In *Vermont Yankee*, the Supreme Court spoke to this court with one voice, making it "absolutely clear" that "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" 435 U.S. at 543 (citations omitted). The unanimous Court went on specifically to caution us against the type of procedural-imposition which has occurred here:

> [I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance.

Id. at 546.

It is hard to imagine a case where the Supreme Court's concluding statement in *Vermont Yankee* could be more apposite than here:

(D.C. Circuit judges may have become "overly enthusiastic" in imposing procedural requirements on administrative agencies); Byse, Vermont Yankee *and the Evolution Of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1832 (1978) (continued judicial imposition of procedural requirements on agencies reflects "insensitivity to the concerns of the agency in deploying its resources to conduct its business, undue self-confidence in the assumption that the court's procedural prescription is 'best,' and lack of trust in the political process . . .").

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function.

435 U.S. at 557-58 (emphasis in original).

We submit the issues raised by *Sholly* demand reconsideration.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-1691

STEVEN SHOLLY and DONALD E. HOSSLER, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL. and UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, ET AL., INTERVENORS

80-1783

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE, VICTOR GILINSKY, RICHARD T. KENNEDY, JOSEPH M. HENDRIE, and PETER A. BRADFORD, in Their Individual Capacities; and THE UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

No. 80-1784

IN RE: PEOPLE AGAINST NUCLEAR ENERGY,
PETITIONER

PETITIONS FOR REVIEW OF ORDERS OF THE
UNITED STATES NUCLEAR REGULATORY COMMISSION
and for WRIT OF MANDAMUS

Before: WRIGHT, Crief Judge, and MIKVA and EDWARDS, Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the United States Nuclear Regulatory Commission and for a Writ of Mandamus and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that respondent Commission acted unlawfully in refusing to hold a hearing in connection with the June 12, 1980, Venting Order, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 19, 1980
Opinion Per Curiam

APPENDIX D

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Commissioners:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford

Docket No. 50-320

IN THE MATTER OF

METROPOLITAN EDISON COMPANY, *et al.*

(Three Mile Island Nuclear Station,
Unit 2)

MEMORANDUM AND ORDER

The Commission has before it a staff recommendation that the licensee, Metropolitan Edison Company, et al., be authorized to commence a controlled purging of the TMI-2 reactor building atmosphere in order to remove the remaining radioactive Krypton-85.[1] To meet the requirements of the National Environmental Policy Act, the staff has submitted in support of this

[1] Most of the radionuclides originally released into the containment atmosphere have decayed to insignificant levels. The dominant remaining radionuclide is the gas, Krypton-85 (Kr-85), which has a 10.7-year half-life. The Environmental Assessment states that approximately 57,000 curies of Kr-85 are mixed in the containment atmosphere, as determined by periodic sampling of Kr-85 concentrations.

recommendation a "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," NUREG-0662, May 1980. The draft version of this assessment and two subsequent addenda were issued for public comment, and by the close of the comment period on May 16, 1980 approximately 800 responses have been received. These are summarized in Section 9 of the final assessment and major comments are included in Volume II of NUREG-0662. The Commission received further information regarding the proposed purging at oral briefings by the staff on June 5, 1980 and June 10, 1980.

In a Statement of Policy dated November 21, 1979 the Commission announced its intent to prepare a programmatic environmental impact statement on decontamination and disposition of radioactive waste resulting from the March 28, 1979 accident at Three Mile Island, Unit 2. The policy statement noted that if the best interest of public health and safety required prompt decontamination action prior to completion of the programmatic statement, such action would not be precluded. The Commission stated among other things, however, that no action to purge the containment of radioactive gases would be taken without a prior environmental review and opportunity for public comment. Before we can approve the staff's recommendation for controlled purging of the TMI-2 containment, we must thus decide whether there is sufficient need for prompt decontamination of the containment atmosphere to justify going ahead prior to completion of the programmatic impact statement. We must also decide whether the decontamination method recommended by the staff can be carried out consistent with the Commission's statutory mandate to ensure adequate protection of public health and

safety and whether the environmental review has met the requirements of the National Environmental Policy Act.

The immediate goal of the proposal to purge the reactor building atmosphere is to remove radioactive particulates and gases released into the containment by the accident. There are several methods discussed in the Environmental Assessment by which the radioactive krypton can be removed. The method recommended by the staff involves controlled release to the outside atmosphere of the gases in the containment through the existing plant ventilation system, the hydrogen control subsystem, and the reactor building purge system. The release rates would be controlled so as to take place only during acceptable metrological conditions, which would be continuously monitored, such that the dose limits established by 10 CFR Part 20, the design objectives of 10 CFR Part 50, Appendix I, and the provisions of 40 CFR Part 190.10, to the extent they may be applicable, will not be exceeded by the controlled purging.[2] In addition to monitoring of releases by the NRC, radiological monitoring during the proposed controlled purging would

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[2] The most restrictive regulation is 10 CFR Part 50, Appendix I. Appendix I sets forth gaseous release annual offsite dose design objectives of 5 millirems to the total body and 15 millirems to the skin. The purging will be limited so that the maximally exposed individual could not receive a dose from purging that exceeds this objective. Gaseous releases from TMI-2 unrelated to purging are expected to be insignificant, so that the annual dose from gaseous effluents should not exceed the annual Appendix I design objective by any significant amount, if at all. Purging will likely result in doses that will exceed the reporting levels of IV.A of Appendix I, but this is of no concern in view of the assurance that the purging will be within the annual design objective.

be conducted by the U.S. Environmental Protection Agency (EPA), the Commonwealth of Pennsylvania, the U.S. Department of Energy and Metropolitan Edison Company.

The Environmental Assessment contains ample evidence to show that risk to physical health from the proposed purge or from any of the alternative decontamination methods considered by the staff would be negligible. See Table 1.1, NUREG-0662. The assessment also addresses the effects on the psychological well-being of persons living in the vicinity of TMI. The staff concluded that psychological stress resulting from the proposed venting of Kr-85 will be less than from any of the alternatives, including the alternative of taking no action. Testimony at the June 5, 1980 oral briefing by expert consultants on the question of psychological stress supported this conclusion and indicated that purging the containment should have the net effect of reducing the stress which otherwise would occur if positive steps are not taken promptly to proceed with decontamination and reduce uncertainty about the present and future condition of TMI-2.

Removing Kr-85 from the containment atmosphere would yield a number of important and immediate benefits. Radiation from Kr-85 at the concentration levels found inside the containment significantly limits worker access and precludes extensive operations needed to gather information, inspect and maintain equipment, and proceed toward the eventual removal of the highly radioactive damaged nuclear fuel from the reactor core. Decontaminating the atmosphere would relieve workers performing necessary maintenance and cleanup activities from hazards of working in awkward protective clothing and risk from

penetrating gamma radiation associated with the decay of Kr-85.[3] Moreover, there is no serious question that removal of the Kr-85 from the containment atmosphere is a necessary step toward core defueling. Until the fuel is removed, TMI-2 will continue to present a potential risk to public health and safety. Thus, decontaminating the containment atmosphere has an immediate and independent utility which justifies proceeding at this time,[4] provided that the proposed method is acceptable on health and environmental grounds.

Because of the importance to the public of having a clear understanding that purging the TMI-2 containment presents a minimal risk to physical health, we review here the basis for concluding that the physical health impacts of venting Kr-85 under proper controls will be negligible. This conclusion was supported by the U.S. Environmental Protection Agency, the U.S. Department of Health and Human Services, the National Council on Radiation Protection and Measurements, the Pennsylvania Department of Environmental Resources, and the Union of Concerned Scientists. Governor Thornburgh of Pennsylvania has indicated in a letter to Chairman Ahearne, dated May

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[3] Only .4% of the Krypton-85 decays in a way that emits gamma rays. At the concentrations in the reactor building, this would be significant to workers. After mixing with the atmosphere, it does not threaten the public health and safety.

[4] The President's Council on Environmental Quality was consulted on the staff's proposal to vent Kr-85. In a letter dated May 19, 1980, and relying on the staff's technical analysis, the Council advised "that as a matter of procedure, staff's proposal does not violate 40 CFR Section 1506.1 (1979) (limitations on actions during NEPA process) of the Council's regulations implementing the National Environmental Policy Act."

16, 1980, that he adopts the consensus that the dose rates associated with controlled purging are insignificant. Krypton-85 has no significant food pathway involvement and in 99.6 percent of its radioactive decays emits only low energy beta particles which primarily affect the skin, one of the tissues least susceptible to radiogenic concerns. The Environmental Assessment estimates that to the maximally exposed individual the risk of skin cancer "would be equivalent to spending 30 minutes in the sun. The average individual in the population would have an added risk of skin cancer equal to about a half-second of exposure to the sun's rays." NUREG-0662, p. 7-7. The total lifetime-individual cancer risk to the maximally exposed individual would be about one in sixteen million, compared to a normal lifetime expectancy of one chance in five from all types of cancer. NUREG-0662, p. 7-2.

Of course, most persons would receive a dose much smaller than the estimated maximum. The Environmental Assessment estimates that the collective offsite dose to the population within 50 miles of TMI-2 will be 0.76 and 63 person-rem for total-body and skin doses, respectively.[5] NUREG-0662, Table 1.1. Based on these figures and on a cancer mortality risk estimate of 135 deaths per million person-rem,[6] the Environmental Assessment finds that "[t]he cancer mor-

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[5] At the oral briefing the staff reported that estimated total-body doses to the U.S. and world populations were about 15 person-rem and 60 person-rem respectively.

[6] This risk estimate is taken from the 1972 Report of the Committee on the Biological Effects of Ionizing Radiation, "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation," National Academy of Sciences, November 1972.

tality risk among the general population within 50 miles resulting from the purge option would be about 0.0001." In other words, the chance that the proposed purge would cause a cancer death among the general public living within 50 miles of TMI is about one in ten thousand. Although the impacts described above apply specifically to a slow purge as originally recommended by the staff, the Environmental Assessment notes that they also apply approximately to a fast purge alternative conducted under meteorological conditions favorable for atmospheric dispersion. The staff's current recommendation calls for use of a fast purge rate if weather conditions permit. The Commission agrees with the technical staff that the physical health impact of this recommended action may be termed insignificant.[7]

Alternative methods which could reduce offsite radiation exposure still further were considered in the Environmental Assessment, including several suggestions offered by commenters on the draft assessment. These included variations of the purging method whereby the Kr-85 would be injected into the atmosphere at a higher level, either by various means of elevating the release point higher than the existing 160-foot stack or by heating the gases prior to discharge to increase its buoyancy. The staff also considered methods whereby the krypton could be captured and stored indefinitely or until the radioactivity decayed to insignificant levels (about 100 years). These methods include (1) selective absorption of

[7] At the oral briefing the staff noted in answer to a question by the Commission about possible health hazards to animals that humans are generally more sensitive to radiation than other living things and that the proposed purging would clearly have no significant effect on animals.

krypton by a scaled-up version of a system now in operation at Oak Ridge National Laboratory, (2) absorption of large quantities of charcoal, (3) gas compression and storage in pressurized containers, and (4) extracting the Kr-85 by liquefying it through cryogenic processing. The alternatives considered appear to have varying degrees of practicality, but the staff found that none of them could be implemented in the near future or, for that matter in a time period much short of a year at the best.[8] The controlled purging method of decontamination recommended by the staff can be implemented immediately. Since the physical health risks of the purging method are extremely small to begin with and since decontaminating the TMI-2 containment atmosphere should not be unnecessarily delayed, for reasons we have already discussed, the Commission agrees with the staff that the possibility of reducing very small physical health risks still further does not justify significant delay and uncertainty associated with implementing an alternative process.

Although the Commission has considered the question of psychological stress, firm conclusions on this subject are not possible. We believe that the alternative chosen will in fact minimize stress, but we have no special competence in this field. It is clear that different aspects of the TMI clean-up are sources of

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[8] In particular, the staff investigated a suggestion that the selective absorption process could be placed into operation in six months by using equipment said to be available from the National Aeronautics and Space Administration and other sources. The suitability of this equipment turned out to be questionable, and the proposed schedule for design and procurement appeared unrealistic. The staff's minimum time estimate for making a selective absorption system operational was 16 months.

stress to different people. However, it is difficult for us to evaluate with precision whether choosing an alternative which would delay TMI cleanup would cause more or less stress than the controlled purging of Kr-85 which a broad consensus of scientific opinion considers safe. We are confident only that the stress will be lessened 1) by our having chosen a plan which rests on a very wide consensus that physical health is not threatened by the krypton release, 2) by having the krypton release occur over the shortest time consistent with the public health and safety, and 3) by a clear step toward cleaning up other potential sources of radiation at the damaged reactor. These three principles are part of this decision.

The Commission thus finds that decontamination of the TMI-2 containment atmosphere should be carried out promptly by the purging method recommended by the staff. Physical health impacts will be negligible, and a long-term reduction in the sources of psychological stress is expected.[9] Thus, there is adequate assurance that public health and safety will be protected as required by the Atomic Energy Act. We agree with the conclusion of the Environmental Assessment that the proposed action will have no significant adverse effect on the environment. Accordingly, no environmental impact statement need

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[9] The Commission has not yet determined whether psychological stress is a health concern cognizable under the Atomic Energy Act and/or an environmental impact cognizable under NEPA. We are presently considering these issues in connection with the TMI-1 restart proceeding. *In the Matter of Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289. In view of our finding that the proposed venting of Kr-85 is likely to have an overall beneficial effect on psychological stress, the present decision does not hinge on how the issues are finally resolved.

be prepared and a negative declaration to this effect may issue. In view of the scope and detail of the Environmental Assessment and the extensive solicitation of public comment, we believe in any case that the purposes of NEPA have been served and that preparation of a formal EIS, had one been required, could not add significantly to the level of environmental consideration and public disclosure already achieved.

TMI-2 is presently being maintained pursuant to restrictions in an order issued by the Director, Office of Nuclear Reactor Regulation on February 11, 1980 requiring the licensee, Metropolitan Edison Company, to maintain the facility in accordance with the requirements of revised technical specifications set forth as an attachment to that order. In implementation of the Commission's Policy Statement of November 21, 1979, these specifications included the restriction that "purging or other treatment of the containment atmosphere is prohibited until approved by the NRC . . . ." In the present order we give the approval contemplated by that restriction insofar as necessary for the licensee to conduct a purging of the TMI-2 containment, commencing no sooner than 10 days from the date of this order, in accordance with the proposal recommended by the NRC staff as presented to the Commission in the record for this proceeding. The licensee shall conduct this purging in accordance with procedures approved by the NRC, pursuant to Section 6.8.2 of proposed Appendix A to the Technical Specifications, NUREG-0432, as made binding on the licensee by the February 11, 1980 order of the Director, Office of Nuclear Reactor Regulation.

Commissioner Gilinsky concurs in the result. Commissioner Bradford's separate views are attached.

Information regarding the carrying out of this decision will be available at 717-782-4014 or 944-0418.

It is so ORDERED.

For the Commission

/s/ Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 12th day of June, 1980.

SEPARATE VIEWS OF COMMISSIONER BRADFORD

While I agree with the result and much of the reasoning in the foregoing Order, I feel compelled to note that it is misleading in three respects:

1. It states that the Union of Concerned Scientists "supported" the conclusion that the physical health impacts of venting Krypton-85 under proper controls will be negligible. The Union of Concerned Scientists did agree with that proposition, but it is disingenuous to imply that UCS agrees with the venting alternative chosen here. The UCS report to Governor Thornburgh is explicit in stating that the NRC's venting alternative should not be undertaken because other alternatives are available within what UCS views as a reasonable period of time and would reduce psychological stress. Thus, UCS should not be listed in the Commission's statement in a fashion designed to imply that they are in accord with the NRC's action.

2. The Order states that the staff also considered methods "whereby the krypton could be captured and stored indefinitely or until the radioactivity decayed to insignificant levels (about 100 years)." In fact, as was brought out at the June 10 meeting on this subject, there would probably be no need to store the krypton for any long period of time. There is a commercial market for Krypton-85, and if an alternative to venting were chosen, the recovered krypton could probably be sold and would not need to be stored. The real argument against recovering the krypton is that the several recovery methods take too long and cost too much

when weighed against the fact that venting will have no significant radiation-related public health impacts. The language suggesting that long-term storage is a serious problem should not have appeared in the staff's environmental assessment and should not appear in this Order.

3. The staff assessment of the cryogenic processing method of recovering the Krypton-85 did not deal adequately with the availability of a completed cryogenic processing system at the Hope Creek nuclear facility. This system is already completed and is on skids and could be moved easily to the site. It could certainly complete its task in less than the 20 months assigned as the minimum for a cryogenic processing alternative. However, I am persuaded that it too would be likely to take at least a year and is therefore not a reasonable alternative to the venting plan endorsed in this order.

I am astonished to have to make these points in a separate opinion, but the Commission has declined to include them in the body of the Order.

APPENDIX E

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Docket No. 50-320

IN THE MATTER OF

METROPOLITAN EDISON COMPANY, ET AL.

(Three Mile Island Nuclear Station, Unit 2)

ORDER FOR TEMPORARY MODIFICATION OF LICENSE

I.

Metropolitan Edison Company, Jersey Central Power and Light Company and Pennsylvania Electric Company (the licensee) are the holders of Facility Operating License No. DPR-73, which had authorized operation of the Three Mile Island Nuclear Station, Unit 2 at power levels up to 2772 megawatts thermal. By Commission order dated July 20, 1979, the licensee's authority to operate the facility, except as provided therein, was suspended. The facility, which is located in Londonderry Township, Dauphin County, Pennsylvania, is a pressurized water reactor used for the commercial generation of electricity.

II.

On March 28, 1979, an accident at the Three Mile Island Nuclear Station Unit 2 resulted in substantial damage to the reactor core and to certain reactor systems and components. The facility is not capable of normal operation and is in a shutdown condition with fuel in the core. The facility is being main-

tained in a stable, long-term cooling mode in accordance with the provisions of the Commission order, dated February 11, 1980. That order did not affect the limits on release of gaseous radioactive effluents set forth in Appendix B, section 2.1.2 of the technical specifications attached as a condition of the license. However, the krypton-85 (Kr-85) released into the reactor building during the accident must be removed from the building so that workers can begin the tasks necessary to clean the building, maintain instruments and equipment, and eventually remove the damaged fuel from the reactor core. Those tasks must be performed whether or not the plant ever again produces electricity. Radiation from the krypton gas, although thinly dispersed through the reactor building atmosphere, nevertheless poses a threat to workers who would have to work in the building for prolonged periods. The preferred method for removing Kr-85 is a kind of flushing or purging process by which the gases would be exhausted from the building and fresh air pulled in.

Section 2.1.2 of the Appendix B technical specifications contains both instantaneous and quarterly limits for releases of noble gases, including Kr-85, to the atmosphere. These limits were developed with normal facility operations in mind and were phrased as limits on releases rather than limits on off-site doses (the effects of the releases) so that compliance with the limits would not necessarily depend on off-site dose measurements. Instead, on-site measurements of the amounts of materials released would be used for determining compliance. These limits could serve to unnecessarily delay the time required to complete the purging process. The revised limits described below would remove this difficulty. They are

expressed as limits on off-site doses rather than as limits on releases. An extensive environmental monitoring network is set up in the Three Mile Island area that is capable of producing prompt and frequent off-site dose measurements. This network, along with on-site measurements of releases and meteorology measurements, will be used to assure compliance with the new limits. Under the revised limits the dose to the maximally exposed individual off-site will be within the limits of the Commission's regulations that would apply if the reactor were operating normally.* Thus the new limits will not be inimical to public health and safety. In addition, since the principal effect is merely to switch from release limits to dose limits, with the same concept of limiting health effects to a specified low amount in mind, the change involves no significant hazards consideration.

The nature and effects of the purging process are described more fully in the Commission's Memorandum and Order in this matter, dated June 12, 1980, and NUREG-0662, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", May 1980.

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* The most restrictive regulation is 10 CFR Part 50, Appendix I. Appendix I sets forth gaseous release annual off-site dose design objectives of 5 millirems to the total body and 15 millirems to the skin. The purging will be limited so that the maximally exposed individual could not receive a dose from purging that exceeds this objective. Gaseous releases from TMI-2 unrelated to purging are expected to be insignificant, so that the annual dose from gaseous effluents should not exceed the annual Appendix I design objective by any significant amount, if at all. Purging will likely result in doses that will exceed the reporting levels of IV.A of Appendix I, but this is of no concern in view of the assurance that the purging will be within the annual design objective.

III.

The Commission has found for the reasons stated above that a temporary and immediate revision to section 2.1.2 of the Appendix B technical specifications would not be inimical to the public health and safety and involves no significant hazards consideration. Accordingly, pursuant to sections 161b and 189a of the Atomic Energy Act of 1954, as amended, and 10 CFR sections 2.204 and 50.54(h) of the Commission's regulations, section 2.1.2 of the Appendix B technical specifications is amended, effective immediately, by adding at the end thereof the following:

> Only for the period of the purge of the TMI-2 reactor building atmosphere, Section 2.1.2h is deleted and Sections 2.1.2a and 2.1.2c are superseded by the following:
>
> > Do not exceed for the maximally exposed individual * in any one of the 16 (22 ½°) sectors centered on the TMI-2 reactor building any of the following:
> >
> > (a) 15 mrem skin dose
> >
> > (b) 5 mrem total body dose
> >
> > (c) 20% of the limits in (a) and (b) shall not be exceeded over any one hour period.

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* Maximally Exposed Individual

(1) One hypothetical individual within *each* of 16 sectors at off-site location with maximum anticipated dose.

(2) No allowance for occupancy time—assume individual present continuously.

(3) No hypothetical individual shall receive more than dose design objectives of (a) and (b) above.

In addition, pursuant to Section 6.8.2 of the proposed Appendix A Technical Specifications, NUREG-0432, made binding on the licensees by the February 11, 1980 order of the Director of the Office of Nuclear Reactor Regulation (NRR), any purging shall be conducted in accordance with procedures approved by the Director, NRR.

Under the above conditions, the licensee is to minimize the total time required to complete purging the reactor building to 10 CFR Part 20 MPC (for workers).

IV.

The licensee or any person whose interest may be affected may, within thirty days, file a request for a hearing with respect to this Order in accordance with the provisions of 10 CFR 2.714. In the event a hearing is held, the issues shall be: (1) whether the temporary technical specification modification imposed herewith (described in Part III above) is in the interest of the public health and safety; and (2) whether this Order should be sustained. A request for a hearing will not stay the effectiveness of this Order. In the event a hearing is held, it shall be consolidated with any hearing held in regard to Commission orders in this docket dated February 11 and May 12, 1980.

A request for a hearing by the licensee or another person must be filed with the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Attention: Docketing and Service Section. A copy of the request for a hearing should also be sent to the Executive Legal Director, U.S. Nuclear

Regulatory Commission, Washington, D.C. 20555 and to Mr. George F. Trowbridge, of Shaw, Pittman, Potts, and Trowbridge, 1800 M Street, N.W., Washington, D.C. 20036, attorney for the licensee. Any questions regarding the contents of this Order should be directed to the Chief Hearing Counsel, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

For further details with respect to this action, see (1) Operating License DPR-73, as amended, (2) NUREG-0662, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", dated May 1980, (3) Commission Memorandum and Order, dated June 12, 1980. All of the above documents are available for inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. and at the Commission's Local Public Document Room at the State Library of Pennsylvania, Government Publications Section, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126, and of the York College of Pennsylvania, Country Club Road, York, Pennsylvania.

FOR THE NUCLEAR REGULATORY COMMISSION

/s/ Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
on June 12, 1980.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 342969 294

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Nos. 80-1640, 80-1656

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL.,
Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITIONS FOR WRITS OF CERTIORARI FILED MARCH 30, 1981
AND APRIL 2, 1981
CERTIORARI GRANTED MAY 26, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1640

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners

v.

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Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COURT OF APPEALS DOCKET ENTRIES

D.C. Cir. No. 80-1691

STEVEN SHOLLY, DONALD E. HOSSLER, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., and the UNITED STATES OF AMERICA, RESPONDENTS

METROPOLITAN EDISON COMPANY, ET AL., INTERVENORS

DATE	FILINGS—PROCEEDINGS
06-23-80	Petitioners' petition for review of an order of the NRC
06-24-80	Certified copy of petition for review was mailed to the NRC & Attorney General
6-24-80	Petitioners' motion for injunctive, declaratory and other relief
6-24-80	Petitioners' motion requesting expeditious consideration of petition for review of final NRC orders
6-24-80	Petitioners' motion for argument and hearing on motions
6-25-80	Motion of Metropolitan Edison Company, et al. for leave to intervene
6-26-80	Respondent's (USA) response to petitioners' motion for injunction pending appeal
6-26-80	Respondent's (NRC) opposition to petitioners' motion for injunction pending appeal (Volumes I and II of a blue book attached)
6-26-80	Certified Index to Record
6-26-80	Clerk's order granting the motion of Metropolitan Edison Company, et al. for leave to intervene

DATE	FILINGS—PROCEEDINGS

6-27-80 Intervenor's opposition to motion for an injunction pendente lite and other relief

6-27-80 Per Curiam order denying the motion for oral argument and denying the motion for injunctive, declaratory and other relief, and granting motion for expeditious consideration. The certified index to record and briefs of the parties shall be filed under a schedule to be developed by the parties provided only that the final brief is filed no later than August 29, 1980; CJ Wright, Tamm (who did not participate) and MacKinnon, CJs

6-27-80 Petitioners' petition for rehearing and suggestion for rehearing en banc

6-27-80 Petitioners' motion requesting expeditious consideration of petition for rehearing

6-27-80 Per Curiam order denying petitioners' petition for rehearing; CJ Wright and MacKinnon, CJ

6-27-80 Per Curiam order, en banc, denying petitioners' suggestion for rehearing en banc; CJ Wright; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, CJs

6-28-80 Petitioners' motion to amend petition and motion for 5 day injunction pendente lite to allow oral argument on petitioners' motion for an order of mandamus directing the holding of public nuclear regulatory hearing, etc.

6-28-80 Petitioners' formal demand for an adjudicatory hearing prior to venting gases from Three Mile Island Unit 2

6-28-80 Petitioners' motion for 5 day TRO stopping the effectuation of the NRC's two 6/12/80 orders until 7/3/80 at 5:00 PM

6-28-80 Per Curiam order denying petitioners' motion to amend petition, etc; petitioners' formal demand, etc; and petitioners' motion for 5 days TRO, etc.; CJ Wright; MacKinnon and Wilkey, CJs

DATE	FILINGS—PROCEEDINGS

7-2-80 Intervenor's notice of filing of executed affidavit of Michael P. Morrell

07-16-80 Intervenor's motion to consolidate Nos. 80-1691, 80-1783 & 80-1784

7-17-80 NRC's motion to consolidate Nos. 80-1691, 80-1783 & 80-1784 and opposition to request for emergency relief

7-23-80 Clerk's order consolidating Nos. 80-1691, 80-1783 and 80-1784

7-31-80 Clerk's order that the following briefing schedule is approved:

Petitioners main brief—8/1/80; Respondents' brief—20 days after petitioners' brief; Intervenors' brief—5 days after respondents' brief; Reply brief—8/29/80

07-31-80 Petitioners' brief

07-31-80 Appendix

07-31-80 Exhibit

08-08-80 Intervenors' motion to dismiss petitions and to suspend briefing and oral argument schedule

08-15-80 Petitioners' opposition to intervenors' motion to dismiss and suspend briefing and oral argument schedule

08-18-80 NRC's response to motion to dismiss

08-19-80 Clerk's order granting intervenors' motion to suspend briefing and oral argument and all briefing and oral argument are held in abeyance pending consideration by the Court on the pending motion to dismiss

08-20-80 Intervenors' reply to petitioners' opposition to motion to dismiss

08-20-80 Respondent's (NRC) brief

08-21-80 Clerk's order, sua sponte, that the order of 8/18/80 is vacated; the briefing will proceed on the previous schedule and oral argument will be heard on 9/8/80; Oral argument on intervenors' motion to dismiss will also be heard on 9/8/80

DATE	FILINGS—PROCEEDINGS

08-22-80 Respondent's (US) motion for leave to file brief in typewritten form, pending printing

08-25-80 Clerk's order granting respondent's (US) motion to file brief in typewritten form

08-25-80 Respondent's (US) brief in typewritten form

08-25-80 Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases: Petitioners—30 minutes; Respondents—30 minutes (Vacated 9-5-80)

08-26-80 Intervenors' brief

08-26-80 Intervenors' appendix

08-27-80 Respondent's (NRC) brief

08-27-80 Respondent's Draft Programmatic Environmental Impact Statement—Lodged for convenience of Court

08-29-80 NRC's motion for leave to file reply brief

08-29-80 Petitioners' reply brief to respondents' brief

08-29-80 Petitioners' reply brief on mootness

09-02-80 NRC's motion to re-allocate time allotted for oral argument

09-03-80 Petitioners' opposition to NRC's motion dated August 29, 1980 and September 2, 1980

09-04-80 Clerk's order granting respondent's motion for leave to file reply brief

09-04-80 Respondent's reply brief

09-05-80 Clerk's order that this Court's order of August 25, 1980 is vacated and that the following times are allotted for the oral argument: Petitioners—30 minutes; NRC—20 minutes; USA—20 minutes

09-08-80 Argued before CJ Wright, Mikva and Edwards, CJ's

DATE	FILINGS—PROCEEDINGS

09-10-80 Respondent's (USA) brief (memorandum)

11-19-80 Opinion Per Curiam

11-19-80 Judgment by the Court, that the Court declares that NRC acted unlawfully in refusing to hold a hearing in connection with requested Venting Order, all in accordance with the opinion of this Court filed herein this date

12-01-80 Petitioners' motion for award of attorneys' fees

12-03-80 Petitioners' bill of costs

12-05-80 Intervenors' (Metropolitan Edison, et al.) motion for leave to file petition for rehearing and suggestion for rehearing en banc with attached affidavit

12-09-80 Respondents' opposition to motion for award of attorneys' fees

12-10-80 NRC's motion for leave to file response to petition for rehearing and suggestion for rehearing en banc filed by Metropolitan Edison, et al.

12-10-80 NRC's motion for leave to file petition for rehearing out of time

12-10-80 NRC's motion for leave to file motion for issuance of stay of mandate

12-11-80 Petitioner's motion to award costs as penalty for frivolous petition for rehearing

12-19-80 Intervenor's (Public Utilities) opposition to petitioners' motion to award costs

01-06-81 Per Curiam order that the Clerk is directed to file the petition for rehearing of the NRC; and that the Clerk is directed to file the petition for rehearing and suggestion for rehearing, en banc, of the Public Utilities; and that the Clerk is directed to file the NRC's response to Public Utilities petition for rehearing and suggestion for rehearing, en banc; CJ Wright, Mikva and Edwards, CJ's

DATE	FILINGS –PROCEEDINGS

01-06-81 NRC's petition for rehearing—filed per above order

01-06-81 Intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc—filed per order of 1-6-81

01-06-81 NRC's response to intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc—filed per order of 1-6-81

01-06-81 Per Curiam order that the Clerk is directed to file the motion of the NRC for stay of mandate; and that the Clerk is directed to stay the issuance of this Court's mandate through February 10, 1981; CJ Wright, Mikva and Edwards, CJ's

01-06-81 NRC's motion to stay issuance of mandate—filed per above order

01-06-81 Petitioner's opposition to NRC's motion to stay issuance of mandate

02-03-81 NRC's motion to extend stay of mandate

02-12-81 Per Curiam order granting NRC's motion to stay mandate and Clerk is directed to stay issuance of mandate for a period of 30 days after disposition of the pending petition for rehearing and suggestion for rehearing en banc; Wright, Mikva & Edwards, CJs

03-03-81 Per curiam order by this Court amending the opinion for the Court filed on 11/19/80 as follows: (see order for details).

03-04-81 ORDERED by the Court, en banc, that the suggestion for rehearing en banc of the Public Utilities is hereby denied.

03-04-81 Circuit Judge Tamm, MacKinnon, Robb and Wilkey would grant rehearing en banc. Their statement is attached (Opinion form).

03-04-81 Per Curiam order on consideration of the petitions for rehearing of the NRC and Public Utilities; the aforesaid petitions are denied.

DATE	FILINGS—PROCEEDINGS

03-12-81 Intervenors' motion to stay issuance of mandate pending applications for certiorari

03-18-81 NRC's motion for further extension of stay of mandate

03-23-81 Per Curiam order that petitioners' motion for an award of attorney's fees is denied; and that petitioners' motion to award costs as a penalty is denied; Wright, Mikva and Edwards, CJ's

04-03-81 Notice from Clerk, SC that petition for writ of certiorari was filed on 3/30/81 in SC No. 80-1640

04-06-81 Certified copy of notice from Clerk, Supreme Court that a petition for writ of certiorari was filed on March 30, 1981 in SC No. 80-1640 and is now pending

04-09-81 Per Curiam order that the motions to stay the issuance of mandate (filed by intervenors Metropolitan Edison Co., et al. and respondent) are granted and the Clerk is directed not to issue the mandate herein prior to May 5, 1981; CJ Wright, Mikva and Edwards, CJ's

04-09-81 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-1656 on April 2, 1981

04-29-81 ORDERED, by the Court that the opinion filed on 11/19/80 is hereby amended as follows: (see order for details).

04-29-81 ORDERED, BY THE Court that the Statement on Denial of Rehearing En banc filed 3/4/81 is amended as follows: (see order for details).

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1640 on 05/26/81

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1656 on 05/26/81

COURT OF APPEALS DOCKET ENTRIES

D.C. Cir. No. 80-1783

(Transferred from the Third Circuit)

PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; JOHN AHEARNE; VICTOR GILINSKY; RICHARD T. KENNEDY; JOSEPH M. HENDRIE; and PETER A. BRADFORD, in their individual capacities; and the UNITED STATES, RESPONDENTS

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY, and PENNSYLVANIA ELECTRIC COMPANY, INTERVENORS

DATE	FILINGS—PROCEEDINGS
07-11-80	Original proceedings transferred from USCA for the Third Circuit (with 2 black binders)
07-11-80	Petitioner's motion for temporary stay or suspension of the operation of two 6/12/80 NRC orders pending the hearing on petitioner's application for stay pending review, and for early hearing thereafter (filed in 3rd circuit)
07-11-80	Petitioner's motion for stay (filed in 3rd Circuit)
07-11-80	Petitioner's motion for an order setting aside the NRC's two 6/12/80 findings (filed in 3rd Circuit)
07-11-80	Petitioner's motion for an order setting aside the NRC's 6/12/80 order making final its 6/12/80 order (filed in 3rd circuit)
07-11-80	Petitioner's motion for entry of declaratory judgment (filed in 3rd Circuit)

DATE	FILINGS—PROCEEDINGS

07-11-80 Petitioner's motion for an order granting request for expedited briefing, oral argument, etc. (filed in 3rd Circuit)

07-11-80 Petitioner's motion for an order directing that briefs be submitted within 3 days and that hearing be held in 5 days (filed in 3rd Circuit)

07-16-80 Intervenor's motion to consolidate Nos. 80-1691, 80-1783 & 80-1784

07-17-80 NRC's motion to consolidate Nos. 80-1691, 80-1783 & 80-1784 and opposition to request for emergency relief

07-17-80 Intervenor's opposition to petitioner's requests for emergency relief

07-23-80 Clerk's order consolidating Nos. 80-1691, 80-1783 and 80-1784

07-31-80 Clerk's order that the following brief schedule is approved: Petitioner's main brief—on or before 8/1/80; Respondents' brief—20 days after petitioners' brief; Intervenors' brief—5 days after respondents' brief; petitioners' reply brief—8/29/80

07-31-80 15-Petitioners' brief

07-31-80 7-appendix

07-31-80 4-Exhibits

08-08-80 4-Intervenors' motion to dismiss petitions and to suspend briefing and oral argument schedule

08-15-80 4-Petitioners' opposition to intervenors' motion to dismiss and to suspend briefing and oral argument schedule

08-18-80 4-NRC's response to motion to dismiss

08-19-80 Clerk's order granting intervenors' motion to suspend briefing and oral argument and all briefing and oral argument are held in abeyance pending consideration by the Court on the pending motion to dismiss (vacated 8/21/80 order)

DATE	FILINGS—PROCEEDINGS

08-20-80 Intervenor's reply to petitioners' opposition to motion to dismiss

08-20-80 Respondent's (NRC) brief

08-21-80 Clerk's order, sua sponte, that the order of 8/19/80 is vacated; The briefing will proceed on the previous schedule and oral argument will be heard on 9/8/80; Oral argument on intervenors' motion to dismiss will also be heard on 9/8/80

08-22-80 Respondent's (US) motion for leave to file typewritten brief, pending printing

08-25-80 Clerk's order granting respondent's (US) motion to file brief in typewritten form

08-25-80 7-Respondent's (US) brief in typewritten form

08-25-80 Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases: Petitions—30 minutes; Respondents—30 minutes. (Vacated per 9-5-80 order)

08-26-80 Intervenors' brief

08-26-80 Intervenors' appendix

08-27-80 Respondent's (NRC) brief

08-27-80 Respondent's Draft Programmatic Environmental Impact Statement—Lodged for convenience of Court

08-29-80 NRC's motion for leave to file reply brief

08-29-80 Petitioners' reply brief to respondents' brief

08-29-80 Petitioners' reply brief on mootness

09-02-80 NRC's motion to re-allocate time allotted for oral argument

09-03-80 Petitioners' opposition to NRC's motions dated August 29, 1980 and September 2, 1980

DATE	FILINGS—PROCEEDINGS

09-04-80 Clerk's order granting respondent's motion for leave to file reply brief

09-04-80 Respondent's reply brief

09-05-80 Clerk's order that this Court's order of August 25, 1980 is vacated and that the following times are allotted for oral argument: Petitioners—30 minutes; NRC—20 minutes; USA—20 minutes

09-08-80 Argued before CJ Wright, Mikva and Edwards, CJ's

09-10-80 15-Respondent's (USA) brief (memorandum)

11-19-80 Opinion Per Curiam

11-19-80 Judgment by the Court, that the Court declares that NRC acted unlawfully in refusing to hold a hearing in connection with requested Venting Order, all in accordance with the opinion of this Court filed herein this date

12-01-80 Petitioners' motion for award of attorneys' fees

12-03-80 Petitioners' bill of costs

12-05-80 Intervenors' (Metropolitan Edison, et al.) motion for leave to file petition for rehearing and suggestion for rehearing en banc with attached affidavit

12-09-80 Respondents' opposition to motion for award of attorneys' fees

12-10-80 NRC's motion for leave to file response to petition for rehearing and suggestion for rehearing en banc filed by Metropolitan Edison, et al.

12-10-80 NRC's motion for leave to file petition for rehearing out of time

12-10-80 NRC's motion for leave to file motion for issuance of stay of mandate

12-11-80 Petitioner's motion to award costs as penalty for frivolous petition for rehearing

DATE	FILINGS—PROCEEDINGS

12-19-80 Intervenor (Public Utilities) opposition to petitioners' motion to award costs

01-06-81 Per Curiam order that the Clerk is directed to file the petition for rehearing of the NRC; and that the Clerk is directed to file the petition for rehearing and the suggestion for rehearing, en banc, of the Public Utilities; and that the Clerk is directed to file the NRC's response to Public Utilities petition for rehearing and suggestion for rehearing, en banc: CJ Wright, Mikva and Edwards, CJ's

01-06-81 NRC's petition for rehearing filed per order of 01-06-81

01-06-81 Intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc—filed per order of 1-6-81

01-06-81 NRC's response to intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc, filed per order of 1-6-81

01-06-81 Per Curiam order that the Clerk is directed to file the motion of the NRC for stay of mandate; and that the Clerk is directed to stay the issuance of this Court's mandate through February 10, 1981; CJ Wright, Mikva and Edwards, CJ's

01-06-81 NRC's motion to stay issuance of mandate—filed per above order

01-06-81 Petitioners' opposition to NRC's motion to stay issuance of mandate

02-03-81 NRC's motion to extend stay of mandate

02-12-81 Per Curiam order granting NRC's motion to stay mandate and Clerk is directed to stay issuance of mandate for a period of 30 days after disposition of the pending petition for rehearing and suggestion for rehearing en banc; Wright, Mikva & Edwards, CJs

DATE	FILINGS—PROCEEDINGS

03-03-81 Per Curiam order by this Court amending the opinion for the Court filed on 11/19/80 as follows: (see order for details).

03-04-81 ORDERED by the Court, en banc, that the suggestion for rehearing en banc of the Public Utilities is hereby denied.

03-04-81 Circuit Judge Tamm, MacKinnon, Robb and Wilkey would grant rehearing en banc. Their statement is attached (Opinion).

03-04-81 Per Curiam order on consideration of the petitions for rehearing of the NRC and Public Utilities, the aforesaid petitions are denied.

03-12-81 Intervenors' motion to stay issuance of mandate pending application for writ of certiorari

03-18-81 NRC's motion for further extension of stay of mandate

03-23-81 Per Curiam order that petitioners' motion for an award of attorney's fees is denied; and that petitioners' motion to award costs as a penalty is denied; Wright, Mikva and Edwards, CJ's

04-03-81 Notification from Clerk, SC that petition for writ of certiorari was filed on 03/30/81 in SC No. 80-1640

04-06-81 Certified copy of notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-1640 on March 30, 1981 and is now pending

04-09-81 Per Curiam order that the motions to stay the issuance of the mandate (filed by intervenors Metropolitan Edison Co., et al. and respondent) are granted and the Clerk is directed not to issue the mandate herein prior to May 5, 1981; CJ Wright, Mikva and Edwards, CJ's

04-09-81 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-1656 on April 2, 1981

DATE	FILINGS—PROCEEDINGS

04-29-81 ORDERED, by the Court that the Opinion filed on 11/19/80 is hereby amended as follows: (see order for details).

04-29-81 ORDERED, by the Court that the Statement on Denial of Rehearing En Banc filed 3/4/81 is amended as follows: (see order for details).

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1640 on 05/26/81

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1656 on 05/26/81

COURT OF APPEALS DOCKET ENTRIES

D.C. Cir. No. 80-1784

(Transferred from the Third Circuit)

IN RE: PEOPLE AGAINST NUCLEAR ENERGY, PETITIONER

DATE	FILINGS—PROCEEDINGS
07-11-80	Petitioner's petition for writ of mandamus—transferred from the United States Court of Appeals for the Third Circuit
07-17-80	NRC's motion to consolidate Nos. 80-1691, 80-1783, 80-1784 and opposition to request for emergency relief
07-23-80	Clerk's order consolidating Nos. 80-1691, 80-1783 and 80-1784
07-31-80	Clerk's order that the following briefing schedule is approved: Petitioners' main brief—on or before 8/1/80; Respondents' brief—20 days after petitioners' brief; Intervenors, brief—5 days after respondents' brief; petitioners reply brief—8/29/80
07-31-80	Petitioners' brief
07-31-80	Appendix
07-31-80	Exhibit
08-19-80	Clerk's order granting intervenors' motion to suspend briefing and oral arguments and all briefing and oral argument are held in abeyance pending consideration by the Court on the pending motion to dismiss (vacated 8/21/80 order)
08-20-80	4-Respondent's (NRC) brief
08-21-80	Clerk's order, sua sponte, that the order of 8/19/80 is vacated; The briefing will proceed on the previous schedule and oral argument will be heard on 9/8/80; Oral argument on intervenors' motion to dismiss will also be heard on 9/8/80

DATE	FILINGS—PROCEEDINGS

08-22-80 4-Respondent's (US) motion for leave to file typewriten brief, pending printing

08-25-80 Clerk's order granting respondent's (US) motion to file brief in typewritten form

08-25-80 Respondent's (US) brief in typewritten form

08-25-80 Clerk's order, sua sponte, that the following times are allotted for the oral argument of these cases; Petitioners—30 minutes; Respondents—30 minutes (Vacates per 9-5-80 order)

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08-27-80 Respondent's Draft Programmatic Environmental Impact Statement—Lodged for convenience of Court

08-29-80 NRC's motion for leave to file reply brief

08-29-80 Petitioners' reply brief to respondents' brief

08-29-80 Petitioners' reply brief on mootness

09-02-80 NRC's motion to re-allocate time for oral argument

09-03-80 Petitioners' opposition to NRC's motions filed August 29, 1980 and September 2, 1980

09-04-80 Clerk's order granting respondent's motion for leave to file reply brief

09-04-80 Respondent's reply brief

09-05-80 Clerk's order that this Court's order of August 25, 1980 is vacated and that the following times are allotted for oral argument: Petitioners—30 minutes; NRC—20 minutes; USA—20 minutes

09-08-80 Argued before CJ Wright, Mikva and Edwards, CJ's

09-10-80 15-Respondent's (USA) brief (memorandum)

11-19-80 Opinion Per Curiam

DATE	FILINGS—PROCEEDINGS

11-19-80 Judgment by this Court, that the Court declares that NRC acted unlawfully in refusing to hold a hearing in connection with requested Venting Order, all in accordance with the opinion of this Court filed herein this date

12-01-80 Petitioners' motion for award of attorneys' fees

12-03-80 Petitioners' bill of costs

12-05-80 Intervenors' (Metropolitan Edison, et al.) motion for leave to file petition for rehearing and suggestion for rehearing en banc with attached affidavit

12-09-80 Respondents' opposition to motion for award of attorneys' fees

12-10-80 NRC's motion for leave to file response to petition for rehearing and suggestion for rehearing en banc filed by Metropolitan Edison, et al.

12-10-80 NRC's motion for leave to file petition for rehearing out of time

12-10-80 NRC's motion for leave to file motion for issuance of stay of mandate

12-11-80 Petitioners' motion for award of costs as penalty for frivolous petition for rehearing

12-19-80 4-Intervenor's (Public Utilities) opposition to petitioners' motion to award costs

01-06-81 Per Curiam order that the Clerk is directed to file the petition for rehearing of the NRC; and that the Clerk is directed to file the petition for rehearing and suggestion for rehearing, en banc, of the Public Utilities; and that the Clerk is directed to file the NRC's response to Public Utilities petition for rehearing and suggestion for rehearing, en banc; CJ Wright, Mikva and Edwards, CJ's

01-06-81 NRC's petition for rehearing filed per above order

DATE	FILINGS—PROCEEDINGS

01-06-81 Intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc—filed per order of 1-6-81

01-06-81 4-NRC's response to intervenor's (Public Utilities) petition for rehearing and suggestion for rehearing, en banc—filed per order of 1-6-81

01-06-81 Per Curiam order that the Clerk is directed to file motion of the NRC for stay of mandate; and that the Clerk is directed to stay the issuance of this Court mandate through February 10, 1981; CJ Wright, Mikva and Edwards, CJ's

01-06-81 NRC's motion to stay issuance of mandate—filed per above order

01-06-81 Petitioners' opposition to NRC's motion to stay issuance of mandate

02-03-81 NRC's motion to extend stay of mandate

02-12-81 Per Curiam order granting NRC's motion to stay mandate and Clerk is directed to stay issuance of mandate for a period of 30 days after disposition of the pending petition for rehearing and suggestion for rehearing en banc; Wright, Mikva & Edwards, CJs

3-3-81 Per curiam order by this Court amending the opinion for the Court filed on 11/19/80 as follows: (see order for details).

3-4-81 ORDERED by the Court, en banc, that the suggestion for rehearing en banc of the Public Utilities is hereby denied

3-4-81 Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant rehearing en banc. Their Statement is attached (Opinion).

3-4-81 Per Curiam order on consideration of the petitions for rehearing of the NRC and Public Utilities, the aforesaid petitions are denied.

DATE	FILINGS—PROCEEDINGS

03-12-81 Intervenors' motion to stay issuance of mandate pending application for certiorari

03-18-81 NRC's motion for further extension of stay of mandate

03-23-81 Per Curiam order that petitioners' motion for an award of attorney's fees is denied; and that petitioners' motion to award costs as a penalty is denied; Wright, Mikva and Edwards, CJ's

04-03-81 Notification from Clerk, SC that petition for writ of certiorari was filed in SC No. 80-1640 on 3/30/81

04-06-81 Certified copy of notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-1640 on March 30, 1981 and is now pending

04-09-81 Per Curiam order that the motions to stay the issuance of the mandate (filed by intervenors Metropolitan Edison Co., et al. and respondent) are granted and the Clerk is directed not to issue the mandate herein prior to May 5, 1981; CJ Wright, Mikva and Edwards, CJ's

04-09-81 Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-1656 on April 2, 1981

4-29-81 ORDERED, by the Court, that the opinion filed on 11/19/80 is hereby amended as follows: (see order for details).

4-29-81 ORDERED, by the Court, that the Statement on Denial of Rehearing En Banc filed 3/4/81 is amended as follows: (see order for details).

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1640 on 05/26/81

06-03-81 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1656 on 05/26/81

TITLE 10—ATOMIC ENERGY

Chapter I—Atomic Energy Commission

PART 50—LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

Technical Specifications

Statement of considerations. The following amendments are designed to clarify the extent to which licensees may make changes, and conduct tests and experiments, which are not specifically provided for in their facility licenses. The amendments reflect consideration of comments received following publication of an earlier draft of these amendments in the FEDERAL REGISTER on April 8, 1961. The amendments substantially revise § 50.36 *Designation of technical specifications,* add a new § 50.59 *Authorization of changes, tests and experiments*; and add on Appendix A, "Contents of Technical Specifications". The revisions for §§ 50.36 and 50.59 are based upon the provisions incorporated in License No. DPR-1 pursuant to the Commission's Memorandum and Order dated November 2, 1960 (in the matter of General Electric Vallecitos Boiling Water Reactor, Docket No. 50-18).

Basically the amendments provide that:

(1) Certain significant design and operating limitations and procedures will be designated as technical specifications which must be adhered to in the absence of specific authorization from the Commission. The technical specifications will reflect in such form limits in design and procedures approved by the Commission. They will represent in essence those parameters which define the boundaries of licensed activity which the Commission has evaluated and approved from a safety standpoint.

(2) The licensee may make changes in the facility, make changes in the procedures described in the hazards summary report, and conduct tests or experiments, unless the proposed change, test or experiment involves a change

in the technical specifications or "an unreviewed safety question", as defined. Records of changes, tests and experiments which do not involve a change in the technical specifications or "an unreviewed safety question" must be kept and included in those made available for inspection by authorized representatives of the Commission and summarized in reports to be periodically submitted to the Commission.

(3) If a proposed change, test or experiment involves a change in the technical specifications or an unreviewed safety question, it may not be carried out unless authorized by the Commission. The request for such authorization must include an appropriate hazards analysis.

(4) Except as noted in paragraph (5), the Commission may authorize any proposed change, test or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered.

(5) With respect to power and testing reactors, the Commission may authorize a proposed change, test or experiment and a change in technical specifications upon determining that it does not present significant hazards considerations not previously described or implicit in the hazards summary report and upon finding that there is reasonable assurance that the public health and safety would not be endangered. If the proposed change involves significant hazards considerations not previously described or implicit in the hazards summary report, the proposed change, test or experiment must be referred to the Advisory Committee on Reactor Safeguards for report and must be scheduled for public hearing.

In conjunction with the adoption of these proposed amendments, the Commission plans to delegate appropriate authority to the staff to determine whether proposed changes, tests and experiments involve a significant hazards considerations [sic] not described or implicit in the hazards summary report and to issue authorization for changes which the rules does not require be referred to the ACRS and to public hearing.

All reports, requests, determinations and authorizations will be made part of the public record of the licensing proceedings.

In order to provide guidance to licensees and applicants, the proposed amendments would add an Appendix A to Part 50 containing a list of matters which are typical of those the Commission would generally expect to be covered by technical specifications in operating licenses. It is emphasized, however, that considerable variation from the subjects listed in Appendix A may be warranted in any particular case. The wide variations found in facility design and operation prevent any listing from being complete. Conversely, it is anticipated that some of the items listed would not be covered in specific operating licenses because of the nature of the particular design or proposed operation.

The proposed amendments would apply to all reactor operating licenses. With respect to existing licenses which do not designate particular portions of the hazards summary report as "technical specifications", the entire report would be designated as "technical specifications". The proposed rules permit amendment of the license upon application by the licensee, or on the Commission's own motion, to designate as "technical specifications" appropriate portions of the hazards summary report.

Notice is hereby given that pursuant to the Administrative Procedures Act and the Atomic Energy Act of 1954, as amended, the following amendments are published as a document subject to codification, to be effective 30 days after publication in the FEDERAL REGISTER.

1. Section 50.36 is amended to read as follows:

§ 50.36 Designations of technical specifications.

(a) Each applicant for a license authorizing operation of a production or utilization facility shall, and each applicant for a construction permit may, designate those provisions of his hazards summary report which he pro-

poses be incorporated as technical specifications in the license or construction permit.

(b) Each license authorizing operation of a production or utilization facility of a type described in § 50.21 or § 50.22 will include technical specifications. The technical specifications incorporated in a license will be designed to include those significant design features, operating procedures and operating limitations which are considered important in providing reasonable assurance that the facility will be constructed and operated without undue hazard to public health and safety. Appendix A is provided as a guide to the type of matters which the Commission would generally expect to be covered by the technical specifications. The Commission may include technical specifications on such additional matters as the Commission finds appropriate to provide reasonable assurance that the facility will be constructed and operated without undue hazard to public health and safety; and may omit items listed in Appendix A if such omission is consistent with the protection of the health and safety of the public.

(c) This section shall not be deemed to modify the technical specifications included in any license issued prior to the effective date of this section. A license issued prior to the effective date of this section in which technical specifications have not been designated, shall be deemed to include the entire hazards summary report as technical specifications. At the initiative of the Commission or the licensee, any license may be amended to include technical specifications of the scope and content which would be required if a new license were being issued.

2. Add the following new § 50.59:

§ 50.59 Authorization of changes, tests and experiments.

(a) The holder of a license authorizing construction or operation of a production or utilization facility may (1) make changes in the facility as described in the

hazards summary report, (2) make changes in the procedures as described in the hazards summary report, and (3) conduct tests or experiments not described in the hazards summary report, unless the proposed change, test or experiment involves a change in the technical specifications incorporated in the license or an unreviewed safety question, as defined in paragraph (c) of this section. If the proposed change, test or experiment involves a change in the technical specifications or an unreviewed safety question, it shall not be carried out unless authorized by the Commission pursuant to the procedures set forth in this section.

(b) The licensee shall maintain records of changes in the facility and of changes in procedures made without prior Commission approval pursuant to this section, to the extent that such changes constitute changes in the facility as described in the hazards summary report or constitute changes in procedures as described in the hazards summary report. The licensee shall also maintain records of tests and experiments carried out without prior Commission approval pursuant to this section. The licensee shall furnish annually to the Commission, or at such shorter intervals as may be specified in the license, a report containing a brief description of such changes, tests and experiments.

(c) A proposed change, test or experiment shall be deemed to involve an unreviewed safety question if (1) the probability of occurrence of an accident previously analyzed in the hazards summary report may be increased; or (2) if consequences of an accident previously analyzed in the hazards summary report may be increased; or (3) if a possibility for a nuclear accident of a different type than any analyzed in the hazards summary report may be created.

(d) The licensee shall file a request for authorization of a change in technical specifications or of any change, test or experiment which requires authorization by the Commission pursuant to paragraph (a) of this section.

The request shall include an appropriate hazards analysis. Each such request shall be filed with the Atomic Energy Commission, Attention: Director, Division of Licensing and Regulation. The licensee shall file three signed originals and 19 additional copies.

(e) With respect to request for changes, tests or experiments or for changes in technical specifications for a facility of a type described in § 50.21(b) or § 50.22, or a testing facility:

(1) If the Commission determines that the proposed change, test or experiment presents significant hazards considerations not described or implicit in the hazards summary report it will refer the request to the Advisory Committee on Reactor Safeguards and will order a public hearing in accordance with applicable procedures. The Commission will promptly notify the licensee of any referral to the Advisory Committee on Reactor Safeguards.

(2) If the Commission determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the hazards summary report, it may authorize such change, test or experiment, without referral to the Advisory Committee on Reactor Safeguards for a report and without a prior public hearing, upon finding that there is reasonable assurance that the health and safety of the public will not be endangered.

(f) With respect to requests for changes, tests or experiments or for changes in technical specifications for a production or utilization facility which is not of a type described in § 50.21(b) or § 50.22 or a testing facility, the Commission may authorize the proposed change, test, or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered.

(g) Any report or request for authorization submitted by a licensee, and any determination by the Commission, or authorization issued by the Commission, pursuant to

this section, will be made a part of the public record of the licensing proceeding. An authorization issued by the Commission will include appropriate changes in the technical specifications.

3. Add the following Appendix A:

APPENDIX A—GUIDE TO CONTENTS OF TECHNICAL SPECIFICATIONS FOR NUCLEAR REACTORS

1. This Appendix is a guide to matters which are typical of those the Commission would generally expect to be covered by technical specifications in operating licenses for nuclear reactors. The generalized form of the guide results in inclusion of items not common to all reactors, and should be used in preparation of technical specifications for a particular facility only to the extent the matters listed are applicable. Conversely, technical specifications are expected to include items other than those listed if such matters could have an effect on the safety of operations comparable in significance to the effect of the following items:

A. *Site.* 1. Physical location of the reactor plant.

2. Minimum distance to boundary of the exclusion area.

3. Principal activities carried on within the exclusion area.

B. *Containment.* 1. Design pressure and maximum total leakage rate at design pressure of the containment vessel (including penetrations).

2. Overall dimensions, materials of construction and approximate free volume of containment barrier.

3. Principal types of containment vessel penetrations, and for each type, the approximate number and methods of closure and sealing (including piping, duct work, and access openings).

4. Shell maximum design pressure under minimum temperature conditions and methods of protection against the cold.

5. Frequency, pressure, and methods of testing of the containment vessel and penetrations.

C. *Primary coolant system.* 1. General system specifications, and major primary system components including:

(a) Number of loops.
(b) Number of isolation and check valves per loop.
(c) Number of steam generators per loop.
(d) Method of coolant circulation and heat removal.
(e) Number of pumps per loop.
(f) Reactor coolant piping material and size.
(g) Volume of primary coolant.

2. Principal reactor vessel design features including:

(a) Temperature and pressure rating (design and operating).
(b) Materials of construction (base metal and cladding).
(c) Overall dimensions.
(d) Types and locations of nozzle connections with respect to core.
(e) Number of and types of penetrations.
(f) Type of closure and any limiting features.

3. Primary coolant specifications:

(a) Materials.
(b) Method of pressurization.
(c) Coolant chemistry limits.
(d) Impurity limits.

4. Operating variables, including:

(a) Minimum core inlet pressure.
(b) Maximum and minimum flow rate through the core.
(c) Maximum core exit bulk temperature.
(d) Maximum heat up and cool down rates of major components.

(e) Reactor vessel pressure limitations as a function of temperature and integrated neutron flux.

5. Principal design features of major components, including:

(a) Primary heat exchanger type and rating.

(b) Type of pump and pump drive.

(c) Isolation valve type and modes of operation.

(d) Check valve type and pressure design.

6. Materials and general configuration of primary system shielding.

D. *Primary plant auxiliary systems.* 1. Principal design features of major components including:

(a) Relief valve types, minimum capacity, relief settings, points for pressure discharge.

(b) Demineralizer type and product specifications.

(c) Pressurizer type and surge capacity.

(d) Coolant charging pump, number, charging rate and pressure design.

(e) Core water injection and containment spray system pumps, number, capacity, injection rate and design pressure.

(f) Reactor plant component cooling system pumps and heat exchanger, number, capacity and pressure design.

(g) Reactor plant control air design pressure, compressor type and rating.

2. Operating limitations, including:

(a) Water chemistry.

(b) Minimum reserve capacity of core water injection and containment spray systems.

(c) Maximum and minimum ambient operating temperature of reactor room.

(d) Minimum level of primary shield tank water level.

E. *Secondary coolant system.* 1. General system design specifications, including:

(a) Coolant.

(b) Maximum pressure, operating and design.

(c) Maximum temperature, operating and design.

(d) Coolant flow rate—maximum and minimum.

(e) Minimum makeup coolant temperature.

(f) Maximum differential temperature and pressure between primary and secondary systems.

(g) Coolant chemistry limits.

2. Principal operating limitations established from considerations of nuclear safety, including:

(a) Loading.

(b) Turbine control.

(c) Steam dumping or bypassing.

(d) Power network interconnections.

(e) Maximum radioactivity.

F. *Reactor core.* 1. Principal core design features, including:

(a) Moderator material.

(b) Reflector material and thickness.

(c) Fuel material, enrichment, and melting or boiling point.

(d) Minimum number of fuel thermocouples, where provided as a safeguard.

(e) Clad material and method of bonding.

(f) Minimum number of clad thermocouples where provided as a safeguard.

(g) Brief fuel element description including nominal dimensions, overall and internal element supports and orificing.

(h) Maximum total mass of core and of fuel in the core.

(i) Maximum number of fuel elements in the core.

(j) Maximum fuel burnup (MWD).

(k) Maximum or minimum void coefficient of reactivity, and maximum operating void fraction.

(l) Temperature and pressure reactivity coefficients, ambient to operating.

(m) Form of burnable poison and method of attachment.

(n) Maximum and minimum reactivity worth of burnable poison.

(o) Brief description of source including minimum initial strength and type.

(p) Number of passes and flow direction through the core.

2. Principal design core temperatures and thermal characteristics, including:

(a) Maximum thermal power.

(b) Maximum local core heat flux (maximum with respect to all variables at rated power).

(c) Minimum burnout safety factor (on heat flux) and correlation method used.

(d) Maximum fuel surface and central temperatures at designated points.

G. *Control and safety systems.* 1. Reactivity control system design and operating limits, including:

(a) Number installed and minimum number of operative control elements and drives.

(b) Principal design features including control element materials, control rod guides, minimum operating clearances, use of followers, limits on allowable operating temperatures and pressures and rod coupling method.

(c) Maximum reactivity worth of automatic control systems and of entire control systems for both operating temperatures (hot) and cold plant conditions.

(d) Maximum reactivity worth of any individual control system component or gang, for hot and cold conditions.

(e) Minimum shutdown control margin for hot and cold conditions.

(f) Minimum number of least reactive control elements corresponding to minimum shutdown margin.

(g) Maximum reactivity addition rate by control elements.

(h) Maximum excess reactivity above cold clean critical.

(i) Automatic modes of reactivity insertion and shutdown and maximum total scram delay time and safety element insertion time.

(j) Type, minimum reactivity worth, conditions of use, and principal design features of auxiliary poison systems.

(k) Rod position indication method and minimum accuracy limits.

(l) Minimum worth of safety control elements cocked during startup, fuel loading and other core manipulations.

(m) Minimum reactor power for automatic control.

2. Nuclear instrumentation system design and operating limits including:

(a) Brief description of the system including ranges, types, and sensitivities of instrument channels and detectors, their degree of independence of operation, and use of redundancy or coincidence circuitry.

(b) Minimum number and ranges of operative level safety and period safety channels during startup and power operation.

(c) Setting of scram points.

(d) Automatic control system inputs.

3. Characteristics of safety control systems auxiliary to the reactivity control and nuclear instrumentation systems including:

(a) Emergency power supply availability, and total loading with respect to minimum capacity.

(b) Devices which are activated on automatic building closure.

(c) Type, functions, and conditions of use of interlocks.

(d) Items which may be bypassed, method of bypassing, and conditions under which bypassing will be used.

(e) Conditions which would automatically cause reactor scram or building closure and activation points for these actions.

(f) Devices causing scram or partial insertion of rods and scram point settings.

(g) Instrumentation primarily or solely provided for analysis of conditions following an accident.

H. *Monitoring systems.* General design features and specific operating limits, including:

1. Stack activity discharge rate averaged over a year and minimum number and sensitivity of operating monitors.

2. Maximum instantaneous stack activity discharge rate.

3. Fuel element failure detection equipment sensitivity, localization and sampling interval (if not continuous).

4. Minimum number and sensitivity of monitors for radiation level detection in accessible areas.

5. Minimum number and sensitivity of monitors of liquid radioactive effluents including primary coolant leak detectors.

6. Criticality monitors in fuel storage areas.

I. *Waste disposal systems.* Design and operating features including:

1. Principal features of equipment for removal of gases or other materials from primary and secondary coolant, moderator, reflector, or shield; equipment capacity and mode of use (continuous or intermittent).

2. Stack height.

3. Minimum waste holdup capacities, storage and processing methods and maximum radioactivity inventories during normal operations, maintenance and refueling.

J. *Ventilation systems.* 1. Brief description of principal features of systems providing safeguards functions, including:

(a) Fans used, capacities and approximate numbers.

(b) Direction of atmospheric pressure gradient across walls, doorways, and other important barriers of the facility and minimum atmospheric pressure differentials across principal barriers where pertinent to contamination control.

(c) Minimum ventilation rates where applicable.

(d) Provisions for ventilation system closure.

(e) Provisions for relief of positive or negative pressures within the enclosed areas upon ventilating system closure.

(f) Location of ventilation system inlets and outlets.

(g) Location, type, and procedures for maintenance of filtering or other air cleaning systems.

K. *Emergency cooling and decay heat removal systems.* 1. Principal system design features.

2. Minimum capacity of emergency heat exchangers.

3. Type, minimum coolant supply, flow rate, and power requirement of emergency cooling systems.

4. Total cooling time made available by emergency cooling systems.

5. Conditions which would automatically cause emergency actions.

6. Source and availability of emergency power.

L. *Fuel storage.* 1. Brief descriptions of physical means by which fuel elements are to be transported within the facility, and conditions under which they are stored.

2. Amount and arrangement (spacing) of special nuclear material to be stored.

3. Basic method or methods by which nuclear safety against inadvertent criticality is assured (mass, geometry).

4. Procedural limitations on quantities to be removed or inserted in storage area at any one time.

5. Means of providing personnel protections against radiation hazards from spent fuel.

M. *Experimental facilities including.* 1. Brief description of principal design features of experimental facilities.

2. Maximum excess reactivity allowed for experiments.

3. Maximum individual reactivity increase to be allowed for any experiment or experimental facility by flooding, draining, poison removal, fueled experiment addition, or other method.

4. For each loop or other experimental facility:

(a) Types of sensors for process variables, output actions, and redundant or coincidence provisions.

(b) Minimum cooling capacity to each experiment, method of cooling, and emergency cooling provisions.

(c) General geometry, minimum pressure resistance, and maximum leak rate of experiment containment barriers.

(d) Significant controls, signals, or other safety mechanisms by which experiments or experimenters (manually or automatically) may shutdown the reactor.

(e) Types of experiments to be conducted and limits on experimental programs, considering such effects as corrosion, explosion, and instrument shadowing.

5. Argon and other activation product limitations.

N. *Administrative and procedural safeguards.* 1. Brief coverage of the following:

(a) The availability of detailed written procedures for operations that might affect nuclear safety and for emergencies.

(b) The manner whereby operating procedures are reviewed and approved for use.

2. Brief description of the following controls procedures and tests:

(a) Administrative organization and controls to the extent that these have potential effect on safety.

(b) General operating principles having a potential effect on safety, including those for initial startup, routine operation, maintenance, refueling, conduct and oper-

ation of experiments, power escalation from criticality to full design power, and emergencies; minimum staffing requirements for such operations where applicable.

(c) Postcritical schedule of maintenance and recalibrating tests of safety system components, monitors, and other equipment having a potential safeguards function including items such as reactor control instruments, control rod systems, effluent release monitors, personnel protection monitors, portable detectors, building leakage and emergency systems.

(d) Procedures for the review within the licensee's organization of proposed modifications in the facility or in operating procedures, and of the design and conduct of experiments.

(Sec. 103, 68 Stat. 936, sec. 104, 68 Stat. 937, sec. 161, 68 Stat. 948, sec. 182, 68 Stat. 953, sec. 183, 68 Stat. 954; 42 U.S.C. 2133, 2134, 2201, 2232, 2233)

Dated at Germantown, Md., this 31st day of May 1962.

For the Atomic Energy Commission

WOODFORD B. MCCOOL,
Secretary.

[F.R. Doc. 62-5615; Filed, June 8, 1962; 8:45 a.m.]

STATEMENT OF POLICY AND NOTICE OF INTENT TO PREPARE A PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Statement of Policy

SUMMARY: The Nuclear Regulatory Commission has decided to prepare a programmatic environmental impact statement on the decontamination and disposal of radioactive wastes resulting from the March 28, 1979 accident at Three Mile Island Unit 2. For some time the Commission's staff has been moving in this direction. In the Commission's judgment an overall study of the decontamination and disposal process will assist the Commission in carrying out its regulatory responsibilities under the Atomic Energy Act to protect the public health and safety as decontamination progresses. It will also be in keeping with the purposes of the National Environmental Policy Act to engage the public in the Commission's decision-making process, and to focus on environmental issues and alternatives before commitments to specific clean-up choices are made. Additionally, in light of the extraordinary nature of this action and the expressed interest of the President's Council on Environmental Quality in the TMI-2 clean-up, the Commission intends to co-ordinate its actions with CEQ. In particular, before determining the scope of the programmatic environmental impact statement the Commission will consult with CEQ.

The Commission recognizes that there are small areas of uncertainty regarding the clean-up operation. For example, the precise condition of the reactor core is not known at this time and cannot be known until the containment has been entered and the reactor vessel has been opened. For this reason, it is unrealistic to expect that the programmatic impact statement will serve as a blueprint, detailing each and every step to be taken over the com-

ing months and years with their likely impacts. That the planned programmatic statement inevitably will have gaps and will not be a complete guide for all future actions does not invalidate its usefulness as a planning tool. As more information becomes available it will be incorporated into the decision-making process, and where appropriate supplements to the programmatic environmental impact statement will be issued. As the decontamination of TMI-2 progresses the Commission will make any new information available to the public and to the extent necessary will also prepare separate environmental statements or assessments for individual portions of the overall clean-up effort.

The development of a programmatic impact statement will not preclude prompt Commission action when needed. The Commission does recognize, however, that as with its Epicor-II approval action, any action taken in the absence of an overall impact statement will lead to arguments that there has been an inadequate environmental analysis, even where the Commission's action itself is supported by an environmental assessment. As in settling upon the scope of the programmatic impact statement, CEQ can lend assistance here. For example should the Commission before completing its programmatic statement decide that it is in the best interest of the public health and safety to decontaminate the high level waste water now in the containment building, or to purge that building of its radioactive gases, the Commission will consider CEQ's advice as to the Commission's NEPA responsibilities. Moreover, as stated in the Commission's May 25 statement, any action of this kind will not be taken until it has undergone an environmental review, and furthermore with opportunity for public comment provided.

However, consistent with our May 25 Statement, we recognize that there may be emergency situations, not now foreseen, which should they occur would require

rapid action. To the extent practicable the Commission will consult with CEQ in these situations as well.

With the help of the public's comments on our proposals we intend to assure, pursuant to NEPA and the Atomic Energy Act, that the clean-up of TMI-2 is done consistently with the public health and safety, and with awareness of the choices ahead. We are directing our staff to include in the programmatic environmental impact statement on the decontamination and disposal of TMI-2 wastes an overall description of the planned activities and a schedule for their completion along with a discussion of alternatives considered and the rationale for choices made. We are also directing our staff to keep us advised of their progress in these matters.

Dated at Washington, D.C. this 21st day of November, 1979.

For the Commission

/s/ Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

[Docket No. 50-320]

Metropolitan Edison Co., et al. (Three Mile Island Nuclear Station, Unit 2) ; Order

I

Metropolitan Edison Company, Jersey Central Power and Light Company and Pennsylvania Electric Company (collectively, the licensee) are the holders of Facility Operating License No. DPR-73, which had authorized operation of the Three Mile Island Nuclear Station, Unit 2 (TMI-2) at power levels up to 2772 megawatts thermal. By Order for Modification of License dated July 20, 1979, the licensee's authority to operate the facility was suspended and the licensee's authority was limited to maintenance of the facility in the present shutdown cooling mode (44 FR 45271). The facility, which is located in Londonderry Township, Dauphin County, Pennsylvania, is a pressurized water reactor used for the commercial generation of electricity.

II

On March 28, 1979, an accident at the Three Mile Island Nuclear Station Unit 2 resulted in substantial damage to the reactor core and to certain reactor systems and components. The facility is not capable of normal operation and is in a shutdown condition with fuel in the core. Although many systems were damaged or have subsequently failed, the facility is being maintained in a safe and stable cooling condition. The July 20, 1979 Order directed that the licensee maintain the facility in a shutdown condition in accordance with approved operating and contingency procedures with decay heat being removed by natural convection circulation of primary coolant through the core with heat rejection through the "A" steam generator.

Some of the systems and components currently being used to maintain the facility in its present mode of op-

eration were not originally included in the facility's Technical Specifications. In fact, in the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for coping with foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by the Order of July 20, 1979. These provisions are now simply inapplicable to the facility in its present post-accident condition. Consequently, the facility's operating license [1] should be modified so as to:

(1) Define operating parameters for the current safe, stable, long-term cooling mode for the facility (defined as the recovery mode), and delete all other permissible operating modes so as to assure that operation of the facility in other than the stable shutdown condition of the recovery mode is precluded:

(2) Impose functional, operability, redundancy and surveillance requirements as well as safety limits and limiting conditions with regard to those structures, systems, equipment and components necessary to maintain the facility in the current safe, stable shutdown condition and to cope with foreseeable off-normal conditions.

(3) Prohibit venting or purging or other treatment of the reactor building atmosphere, the discharge of water decontaminated by the EPICOR-II system, and the

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[1] The existing Appendix B Technical Specifications imposed for the protection of the environment upon issuance of the TMI-2 operating license would be unchanged and would remain in effect, except that Appendix B Technical Specifications 5.1, 5.2 and 5.3, which identify the licensee's pre-accident management organization for activities addressed by the Appendix B Technical Specifications, are deleted since those requirements will now be performed in accordance with proposed Technical Specifications 6.1, 6.2 and 6.5 which will set forth the current requirements for the licensee's management organization for *all* licensed activities.

treatment and disposal of high-level radioactively contaminated water in the reactor building, until each of these activities has been approved by the NRC, consistent with the Commission's Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement (44 FR 67738).

III

For the above reasons, the Facility Operating License has been reviewed and a new set of Technical Specifications has been developed to account for the present condition of the facility and to assure the continued maintenance of the current safe, stable, long-term cooling condition of the facility. The Staff's safety assessment addressing the requirements of the proposed Technical Specifications is set forth in the concurrently-issued Safety Evaluation.

The Office of Nuclear Reactor Regulation has also performed an environmental evaluation of the requirements that would be imposed by these proposed Technical Specifications as reflected in the Environmental Assessment, also issued concurrently. It was determined that since the limits on effluent releases and discharges contained in Appendix B to the Facility Operating License are not being changed and remain in effect, and the proposed Technical Specifications attached to this Order do not authorize a change in effluent types or total amounts nor an increase in power level that the proposed Technical Specifications will not result in any significant environmental impact. Accordingly, a negative declaration is being issued concurrently pursuant to 10 CFR 51.5(c)(1) of the Commission's regulations.

Proposed Technical Specification 6.8.1, regarding Administrative Controls, requires that written procedures implementing certain requirements of the modified Technical Specifications be prepared by the licensee. Proposed Technical Specification 6.8.2 provides that these written procedures are to be submitted to, and are sub-

ject to approval by the NRC prior to implementation. Since these written procedures will implement certain requirements of the proposed Technical Specifications, some period of time will be required after its effective date for the licensee to prepare the appropriate written procedures. Based on discussions with the licensee and an evaluation of the scope of the written procedures required, it has been determined that a period of 30 days from the date of this Order will be sufficient for the licensee's preparation of the written procedures required by proposed Technical Specification 6.8.1.

Incorporation into the license of the proposed Technical Specifications would both impose necessary requirements on the licensee to reflect the present condition of the facility and to assure continued maintenance of the current safe, stable, long-term cooling condition of the facility, and facilitate the Commission's enforcement program by providing a single and readily available compilation of enforceable requirements. For these reasons, it is proposed that the license be amended so as to include the Technical Specifications set forth in Attachment 1 hereto. The formal license amendment incorporating these proposed Technical Specifications will become effective on the expiration of the period specified below, during which the licensee or any other person whose interest may be affected may request a hearing or, in the event a hearing is requested and granted, on the date specified in an order made following the hearing or other disposition of such proceeding.

As indicated above, the July 20, 1979 Order directed the licensee to maintain the facility in a shutdown condition in accordance with approved operating and contingency procedures. This Order is still in effect. The operating and contingency procedures referred to have evolved over the course of the past several months and are now reflected in the requirements that have been included in the proposed Technical Specifications set forth in Attachment 1.

In order to eliminate any possible uncertainty as to the nature and requirements of the operating and contingency procedures referred to in the July 20, 1979 Order, the public health, safety and interest require that that Order be amended effective immediately, as set forth below, pursuant to section 161.b of the Atomic Energy Act of 1954, as amended, to include the requirements in Attachment 1. When the proposed Technical Specifications become effective as a result of the formal amendment of the Facility Operating License, they will supersede the July 20, 1979 Order, as amended, since there will be no need to maintain a duplicate set of legal requirements on the licensee.

IV

Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, it is ordered that (1) Effective immediately, the Director's Order for Modification of License of July 20, 1979 is amended by deleting paragraph (2) and substituting the following:

(2) Pending further amendment of the Facility Operating License, the licensee shall maintain the facility in accordance with the requirements set forth in Attachment 1 to the Director's Order dated February 11, 1980.

(2) Effective March 21, 1980 or, in the event a hearing is requested and granted, on the date specified in an order made following the hearing or other disposition of the proceeding, all Appendix A Technical Specifications and Appendix B Technical Specifications 5.1, 5.2 and 5.3 to Facility Operating License No. DPR-73 in effect on March 28, 1979 and all changes thereto issued between that date and the date of this Order are superseded by the proposed Technical Specifications set forth in Attachment 1 hereto.

(3) The written procedures required by proposed Technical Specification 6.8.1 in Attachment 1 hereto shall be completed and submitted to the NRC 30 days after the date of this Order. Pending approval of the written

procedures by the NRC, the licensee shall follow the previously approved procedures.

V

The licensee or any person whose interest may be affected may, on or before March 21, 1980, file a request for a hearing with respect to this Order, pursuant to 10 CFR § 2.714. As indicated, a request for a hearing with regard to paragraph (2) of this Order shall operate to stay the effectiveness of that paragraph. Accordingly, any such hearing regarding paragraph (2) shall be conducted prior to the adoption of the formal license amendment incorporating the Technical Specifications set forth in Attachment 1 hereto. However, a request for hearing with regard to paragraphs (1) and/or (3) shall not operate to stay the effect of those paragraphs. In the event a hearing is held with regard to paragraph (1) and/or (3), however, such a hearing shall be consolidated with any hearing that may be requested pursuant to paragraph (2). In the event a hearing is held, the issues shall be: (1) whether the requirements set forth in Attachment 1 hereto (summarized in Part II above) are necessary and sufficient for the maintenance of the facility to protect health and safety or to minimize danger to life and property; and (2) whether the provisions of this Order would significantly affect the quality of the human environment.

A request for a hearing must be filed with the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Section, by the above date. A copy of the request for a hearing should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555 and to George F. Trowbridge, Esq., Shaw, Pittman, Potts, and Trowbridge, 1800 M Street, NW., Washington, DC 20036, attorney for the licensee. Any questions regarding the contents of this Order should be directed to the Chief Hearing Counsel, Office of the

Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

For further details respect [sic] to this action, see (1) Operating License DPR-73, as amended, (2) NUREG-0557, "Evaluation of Long-Term Post-Accident Core Cooling of Three Mile Island, Unit 2." NRC Staff Report, dated May, 1979, (3) Memorandum to R. Vollmer from A. Ignatonis, "TMI-2 Plant Modifications for Cold Shutdown, Rev. 2," dated June 8, 1979, (4) letter to R. Vollmer, NRC, from R. C. Arnold, Metropolitan Edison Co., "Reactor Containment Building Atmosphere Cleanup," dated November 13, 1979, (5) the Commission Staff's related Safety Evaluation and Environmental Assessment (NUREG-0647), and (6) the Director's Order for Modification of License dated July 20, 1979. All of the above documents are available for inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC and at the Commission's Local Public Document Room at the State Library of Pennsylvania, Government Publications Section, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126.

Dated at Bethesda, Maryland this 11th day of February, 1980.

For the Nuclear Regulatory Commission.

HAROLD R. DENTON.
Director, Office of Nuclear Reactor Regulation.

[Docket No. 50-320]

Negative Declaration Regarding Proposed Technical Specifications for Three Mile Island Nuclear Station, Unit No. 2

The U.S. Nuclear Regulatory Commission has determined that the public health, safety and interest require Modification of Facility Operating License No. DPR-73, issued to Metropolitan Edison Company, *et al.* for operation of the Three Mile Island Nuclear Station Unit 2 located in Londonderry Township, Dauphin County, Pennsylvania. This action would modify the Technical Specifications of the Facility Operating License to more accurately reflect the present condition of the facility resulting from the March 28, 1979 accident. Some of the systems and components currently being used to maintain the facility in its present mode of operation were not originally included in the facility's Technical Specifications. In fact, in the present post-accident status of the facility, the license itself does not include explicit provisions or Technical Specifications for assuring the continued maintenance of the plant in a safe, stable condition or for providing for foreseeable off-normal conditions. Moreover, certain portions of the facility's operating license relate to or govern power operation of the facility, the authority for which was suspended by Order for Modification of License of the Director, Office of Nuclear Reactor Regulation, dated July 20, 1979. These provisions are simply inapplicable to the facility in its present post-accident condition. Consequently, by Order dated February 11, 1980, the Director (1) amended the Order of July 20, 1979 effective immediately, to require that the licensee maintain the facility in accordance with the requirements set forth in Attachment 1 to the Order, and (2) proposed to formally amend the Technical Specifications accordingly, in the following areas: Nuclear Safety; Core Cooling, Water Inventory and Reactor Coolant System Pressure Control; Instrumentation; Containment Systems; Fire Detection and Fire Suppression;

Electrical Power; Control of Radioactive Materials in Liquid and Gaseous Effluents; and, Review and Audit Functions.

The Office of Nuclear Reactor Regulation prepared a combined Safety Evaluation and Environmental Assessment (NUREG-0647) in connection with this action. It was determined that since the limits on effluent releases and discharges contained in the environmental Technical Specifications for the Facility Operating License (Appendix B) are not being changed and remain in effect, the actions encompassed by this Order do not authorize a change in effluent types or total amounts nor an increase in power level and will not result in any significant environmental impact. In addition, the Technical Specifications include prohibitions against the purging or other treatment of the reactor building atmosphere, the discharge or other disposal of water decontaminated by the Epicor-II system and the treatment and discharge or other disposal of the high-level radioactively contaminated water now in the reactor building without further Commission approval. Thus, in accordance with this finding, no Environmental Impact Statement will be prepared.

The Safety Evaluation and Environmental Assessment (NUREG-0647) and the Director's Order issued February 11, 1980 are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C., and at the Three Mile Island Unit No. 2 Local Public Document Room in the Government Publications Section, State Library of Pennsylvania, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania. Copies may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Richard Vollmer, Director TMI-2 Support, NRR.

Dated at Bethesda, Maryland this 11th day of February, 1980.

For the Nuclear Regulatory Commission.

HAROLD R. DENTON.
Director, Office of Nuclear Reactor Regulation.

THREE MILE ISLAND NUCLEAR STATION UNIT 2

Technical Specifications

Appendix "A"
to
License No. DPR-73

INTRODUCTION

On March 28, 1979, an accident occurred at the facility which resulted in damage to the reactor core and to certain reactor systems and components. The reactor is being maintained in a stable cooling mode removing decay heat by natural convection circulation of primary coolant through the core and the "A" steam generator. The "A" steam generator is producing steam which is condensed in the condenser and recirculated to the "A" steam generator. An alternate means of removing decay heat from the primary coolant is through the "B" steam generator. The steam side of the 'B" steam generator has been modified to provide a water solid, closed loop cooling system which is in turn cooled by the secondary services closed cooling water system. Either steam generator cooling mode is adequate to remove decay heat from the primary coolant.

As a result of the core and equipment damage, various requirements set forth in the Technical Specifications governing operations are no longer appropriate. For example, certain equipment required to be operable is no longer operable as defined in the technical specifications. Other systems not generally relied on for safe shutdown of the reactor are being used to maintain the facility in the stable mode of heat removal. High radioactivity in containment and in the reactor coolant and radioactivity in certain auxiliary areas have limited access to certain

components or have limited the ability of certain systems or components in their original design mode. A number of systems and components have been modified in order to respond to the initial emergency condition.

These revised Technical Specifications are to provide assurance that the facility in its present status will provide adequate safety while certain additional work activities are carried out at the facility during the forthcoming period of core cooling.

In addition to continuing to maintain core cooling, certain work is planned for the period during which these revised specifications will be applicable.

(1) Systems and components presently functioning to maintain core cooling may be modified to enhance their operability and reliability, and new systems may be added to maintain recovery functions.

(2) Presently non-functioning systems or components useful to enhance safety are being restored to operable status or modified to function appropriately.

(3) Activities to maintain control over radioactive effluents from the facility will continue with modifications as necessary to enhance such control.

(4) Decontamination and cleanup of areas to reduce exposure and to control radioactive materials will continue.

These activities and modifications will be performed during the period in which these revised specifications are effective.

The revised Technical Specifications have been prepared to cover the functional capability or performance levels of systems or components required for the safe operation of the facility. The revised Technical Specifications shall

however, in no way modify the obligation of the licensee to take all appropriate steps needed to assure public health and safety in connection with the facility at all times; and shall not be deemed to prohibit or restrict the licensee from taking any emergency action necessary to protect the health and safety of the public in the event of any emergency conditions that may arise during the period governed by these revised Technical Specifications.

Detailed surveillance requirements for implementing these specifications are set forth in the Recovery Operations Plan. The specific plant operating procedures which are subject to review and approval by the NRC staff are identified in Section 6.8 of the Technical Specifications.

These revised Technical Specifications will remain in effect until superseded, and may be supplemented, amended or modified from time to time.

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[page 3.6-1]

LIMITING CONDITIONS FOR OPERATION

3.6 CONTAINMENT SYSTEMS

3.6.1 PRIMARY CONTAINMENT

CONTAINMENT INTEGRITY

3.6.1.1 Primary CONTAINMENT INTEGRITY shall be maintained and all containment penetrations, including at least two OPERABLE containment isolation valves or a double barrier in each penetration, shall be closed when not required open per procedures approved pursuant to Specification 6.8.2. Purging or other treatment of the containment atmosphere shall be prohibited until approved by the NRC.

APPLICABILITY: RECOVERY MODE.

ACTION:

With one containment isolation valve per containment penetration open or inoperable, maintain the affected penetration(s) closed with either:

a. At least one deactivated automatic valve secured in the isolation position, and

b. At least one closed manual valve, or a blind flange.

CONTAINMENT AIR LOCKS

3.6.1.3 Each containment air lock shall be OPERABLE with:

a. Both doors closed except when the air lock is being used for transit entry and exit through the containment, then at least one air lock door shall be closed.

b. An overall air lock leakage rate of less than or equal to 0.05 L_a at P_a, 56.2 psig.

APPLICABILITY: RECOVERY MODE.

ACTION:

With an air lock inoperable, maintain at least one door closed and restore the air lock to OPERABLE status within 24 hours.

* * * * *

BASES

FOR

LIMITING CONDITIONS FOR OPERATION

AND

SURVEILLANCE REQUIREMENTS

NOTE

The summary statements contained in this section provide the bases for the specifications of Sections 3.0 and 4.0 and are not considered a part of these technical specifications as provided in 10 CFR 50.36.

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[page B 3/4-6-1]

3/4.6 CONTAINMENT SYSTEMS

BASES

3/4.6.1 PRIMARY CONTAINMENT

3/4.6.1.1 CONTAINMENT INTEGRITY

Primary CONTAINMENT INTEGRITY must be maintained to ensure that the radioactive materials which were released to the containment atmosphere during the March 28, 1979 incident will not be released to the atmosphere.

On November 21, 1979, the Commission issued a Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement addressing the overall decontamination and cleanup activities at TMI-2, including, among other things, the purging or other treatment of the containment atmosphere (44 F.R. 67738). The Commission recognized in its Statement that it may be in the best interest of the public health and safety to purge the containment during the development of the programmatic statement. If the need to take such prompt action arises the Commission has stated that it will consider the advice of the Council on Environmental Quality (CEQ) as to the Commission's NEPA sponsibilities [sic], and moreover, will not take such action until the activity has undergone an environmental review with opportunity for public comment. The Commission further recognized that there may be emergency situations, not at this time forseen, which could require rapid action. In these situations, the Commission has indicated its intention to consult with CEQ to the extent practicable. Accordingly, the purging or other treatment of the containment atmosphere is prohibited until approved by the NRC consistent with the foregoing.

3/4.6.1.3 CONTAINMENT AIR LOCKS

The containment air locks must be maintained OPERABLE to provide CONTAINMENT INTEGRITY. These air locks will be used during future entries into the containment to ensure that the containment atmosphere will not be released to the environs.

3/4.6.1.4 INTERNAL PRESSURE

The negative pressure limit provides assurance that the containment will not exceed its design negative pressure differential. The positive pressure limit provides assurance that leakage from the containment will be limited for dose considerations.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Commissioners: John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford

Docket No. 50-320

IN THE MATTER OF
METROPOLITAN EDISON COMPANY, ET AL.

(Three Mile Island Nuclear Station, Unit 2)

ORDER DENYING MOTION FOR RECONSIDERATION OF CLI-80-25 AND ORDER FOR TEMPORARY MODIFICATION OF LICENSE

On June 12, 1980, the Commission issued a Memorandum and Order, CLI-80-25, which approved purging of the TMI-2 reactor building atmosphere as proposed by the NRC staff. The staff's proposal was described in detail in the "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," NUREG-0662, May 1980. This purging can be carried out in such a manner (a "slow purge") that the release of radioactive effluents, primarily krypton-85, will lie within the limits allowed by the technical specifications which are part of the TMI-2 operating license. A faster rate of purging is advan-

tageous, however, for reasons discussed in the Memorandum and Order. To permit a faster purge the Commission issued an accompanying Order for Temporary Modification of License, which temporarily imposed dose limits in place of the noble gas instantaneous and quarterly activity release limits contained in the TMI-2 technical specifications.[1] Purging of the TMI-2 containment is presently expected to begin on June 28, 1980.

The Commission received on June 23, 1980 a "Joint Motion for Reconsideration of CLI-80-25 and Order for Temporary Modification of License," submitted by Steven C. Sholly, the Newberry Township Three Mile Island Steering Committee, and People Against Nuclear Energy ("PANE"). The Commission has also received a study entitled "Radiation Exposure Due to Venting TMI-2 Reactor Building Atmosphere," prepared by Bernd Franke and Dieter Teufel of the Institute for Energy and Environmental Research, Heidelberg, West Germany, for the Three Mile Island Legal Fund, and dated June 12, 1980. The Franke/Teufel study, which arrived too late to be included in the administrative record for the Memorandum and Order,[2] takes issue with the Commission's conclusion, otherwise widely supported, that the

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[1] For the period of the purge the modified license will control releases of radioactive gases to the atmosphere by limits on the radiological dose which can result from such releases, in particular by requirements that doses to maximally exposed individuals as a result of purging not exceed 15 mrem skin dose, 5 mrem total body dose, or 20% of either of those limits over any one-hour period. These offsite dose limits are in effect equivalent to the objectives set out in 10 CFR Part 50 Appendix I, which implement the Commission's policy that radiation doses from nuclear power plants shall be kept "as low as reasonably achievable" ("ALARA"). The Commission's Order for Temporary Modification of License thus aimed at achieving the same level of health protection intended by the superseded release limits while at the same time permitting a rapid completion of the purging process.

[2] The Commission received a very brief handwritten summary of the conclusions of this study on June 5, 1980 but was not given the full report until June 16, 1980.

physical health impacts of purging the TMI-2 containment as proposed will be negligible. This study is cited in the Joint Motion as evidence of the need for the Commission to reconsider its decision to permit purging. In view of the importance to the public of having accurate information on the health risks of purging, the Commission believes it desirable in the short period remaining before the purging begins to make a prompt though necessarily brief response to the Franke/Teufel study as well as to the motion for reconsideration.

Accordingly, we are attaching to this order a review of the Franke/Teufel study prepared by the NRC technical staff. The staff's review confirms that *all* radionuclides potentially in the containment atmosphere, not just krypton-85, were considered by the staff in its assessment of the environmental impacts of purging the TMI-2 reactor building. Radionuclides other than krypton-85 will not contribute significantly to offsite doses from purging. As the staff's review explains in detail, the Franke/Tuefel study erred by selecting a single erroneously calibrated measurement of the radionuclide concentrations in the containment. This measurement was clearly inconsistent with previously and subsequently measured radionuclide concentrations and gave values too large by factors of ten thousand to ten million. The corresponding dose calculations made by the Franke/Teufel study are thus gross over-estimates. Furthermore, the study's concern about meterological uncertainties and possible inadequacy of monitoring appear to reflect unawareness or misunderstanding of how the purging program is to be carried out. In sum, the Commission has found that the Franke/Teufel study provides no reason to modify the conclusion that the proposed venting of the TMI-2 reactor building involves negligible impacts on physical health.

Turning now to the motion for reconsideration, we find that the discussion above deals adequately with the first reason offered for reconsideration, that "[t]he Orders do not consider in any detail the possible presence of

radionuclides other than Krypton-85 in the TMI-2 containment atmosphere." The environmental assessment, as well as the staff's review of the Franke/Teufel report, confirm that krypton-85 is by far the dominant radionuclide. In any event, it should be noted that the purging will be conducted so that the dose limits established by the Commission's Order for Temporary Modification of License will not be exceeded. A continual monitoring of release activity levels and meterological conditions will be conducted to assure that this requirement is met. Thus if radionuclide concentrations should exceed presently expected values, this fact would become quickly apparent and releases would be controlled or, if necessary, stopped so that doses will remain within the allowable limits.

The Joint Motion criticized what it terms a "radiological assessment" of the health risks of venting as distinct from a "public health assessment" by "public health professionals." The joint petitioners also appended to their motion a letter from Irwin Bross of the Roswell Park Memorial Institute, Buffalo, New York, to the effect that the genetic damage and cancer risk estimates used by the Commission in assessing the risk of krypton venting are out of date and far too low. The short answer to the joint petitioners' concern about the Commission's assessment that purging presents no significant physical health risks is that there was broad agreement with this assessment by groups with expertise oriented toward protection of public health, including the National Council on Radiation Protection and Measurements, the U.S. Department of Health and Human Services, and the Pennsylvania Departments of Health and Public Welfare. The controversial views of Dr. Bross regarding radiation health risks are known to the Commission from previous occasions. To the extent that Dr. Bross would conclude that purging the TMI-2 containment involves a significant physical health risk, his views are clearly at odds with the spectrum of scientific opinion cited here and in the Commission's Memorandum and Order in support of the contrary conclusion.

The Commission thus finds that the Joint Motion presents no reason to alter the Commission's key determination that the proposed purging of the TMI-2 containment will have a negligible impact on physical health. The benefits of prompt purging were discussed at length in the Memorandum and Order. To risk these benefits by selecting an alternative process, which necessarily would involve significant delay and uncertainty, in order to reduce already negligible radiological impacts still further does not strike the Commission as reasonable. Accordingly, the Commission finds the proposed purging entirely consistent with the ALARA principle of keeping radiation exposure "as low as reasonably achievable."

The Joint Motion also urged that the psychological aspects of purging "should be examined more closely" but cited no evidence to contradict the Commission's belief that prompt purging will remove a significant source of psychological stress related to the presence of the disabled TMI-2 facility. The Commission has admitted its lack of expertise in psychology and recognizes that more review and study might further clarify the situation with respect to psychological stress at TMI-2. We remain confident, however, that stress is likely to be minimized by proceeding promptly with a plan that poses no threat to physical health. The Joint Motion offers no reason to believe that further study would change that conclusion. Accordingly, we are not persuaded that purging be delayed for further examination of pychological stress.

Finally, the Joint Motion criticized our finding that the temporary license modification involves "no significant hazards consideration" and therefore may be made immediately effective. We believe the joint petitioners have misunderstood the scope of this finding, which pertains only to the question whether changing the TMI-2 technical specifications from release limits to dose limits involves a significant hazards consideration. The dose limits aim at achieving the same level of protection of public health and safety [3] and, in fact, do so more directly, since it is

[3] See note 1 above.

the associated doses rather than the radioactive releases themselves which are the focus of concern. Accordingly, the Commission reaffirms its determination that the temporary license modification involves no significant hazards consideration and may therefore be made effective immediately.

With regard to purging itself, the unmodified technical specifications which allow for purging were adopted as part of the licensing proceeding for TMI-2 after full opportunity for a public hearing. There has been extensive public participation in the purging decision through public meetings and comments on the environmental assessment. There has thus been ample opportunity for members of the public to raise any issue which might have been brought up in an adjudicatory hearing and to present evidence contradictory to the positions of the NRC staff or Metropolitan Edison. The joint petitioners complain that there has been no public hearing specifically devoted to purging, but they have not indicated that any relevant evidence exists which they have somehow been prevented from bringing to the Commission's attention. Accordingly, since the procedures by which the Commission's orders were developed met the requirements of the Atomic Energy Act and have provided for a thorough consideration of the issues, we reject the suggestion that these orders should be withdrawn on procedural grounds.

For the reasons discussed above, the Commission denies the motion for reconsideration of CLI-80-25 and Order for Temporary Modification of License.

It is so ORDERED.

For the Commission

/s/ Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 26th day of June, 1980.

REPORT BY THE INSTITUTE FOR ENERGY AND ENVIRONMENTAL RESEARCH HEIDELBERG, FEDERAL REPUBLIC OF GERMANY

The NRC staff has made a preliminary review of the findings presented in the report titled "Radiation Exposure Due to Venting TMI-2 Reactor Building Atmosphere" submitted by the Institute for Energy and Environmental Research, dated June 12, 1980. The staff believes that the major conclusions of this report are in error and misleading, primarily because they are based on a highly inflated estimate of the maximum rate at which radionuclides will be released during the venting and an apparent lack of understanding of how the venting will be carried out and controlled.

Heidelberg Finding No. 1

Previous discussion of the venting of radioactive gases from TMI-2 has concerned only the noble gas krypton-85. Besides krypton-85, the atmosphere of the reactor building includes a great number of other radionuclides, some of which would be released into the environment during the blow off of the gases. This could lead to radiation exposures significantly higher than those caused by krypton-85. The most important radionuclides, which have not been sufficiently considered so far include: C 14, Co 60, Sr 89, Sr 90, Ru 106, Cs 134, Cs 137, Pu 239, Pu 241 and others. Even allowing for high filter efficiency, a model calculation for only three of these nuclides showed that population doses would be high enough to cause about three additional cancer cases and an equivalent amount of genetical damage.

Staff Comment

The NRC staff's analysis (NUREG-0662) of the environmental impacts associated with purging the TMI-2

reactor building atmosphere is based on consideration of *all* radionuclides including noble gases, transuranics, tritium, cesiums and cobalts and other particulates. Air samples are periodically collected and analysed [sic] to identify all measureable forms of radioactivity. The dominant and controlling radionuclide is Kr-85. Relative to Kr-85, all other radionuclides in the reactor building atmosphere are insignificant contributors to calculated offsite doses from a postulated purge.

The reactor building particulate samples taken during January through April of this year indicated Cs-137 concentrations ranging from 1.2 X 10^{-8} to 2.7 X 10^{-10} μCi/cc. The particulates Co-58, Co-60, Cs-134, Sr-89, and Sr-90 were measured at levels on the order of 10^{-10} to 10^{-11} μCi/cc or were below minimum detectable levels ($\sim 10^{-10}$ μCi/cc) for the instrumentation. Gross measurements of samples of the reactor building atmosphere taken in April of this year indicate transuranic concentrations no higher than 2.0 X 10^{-10} μCi/cc. It should also be noted that, during the postulated purge, the reactor building atmosphere will be passed through HEPA filters with a measured filtration efficiency of at least 99.97%.

The Heidelberg group based its particulate source term (primarily Co-60 and Cs-137), and the resulting dose calculations and health effects predictions, on the highest reported values for the concentrations of these isotopes, ignoring a number of other values listed on the same table (Table 2.1 of the Met Ed reference). Unfortunately, these single highest values, which were a factor of 10^4 to 10^7 higher than other reported values, were erroneous. Particulate concentrations are determined by measuring the total radioactivity in a sample of air passed through the particulate sampler, and then dividing by the sample volume. In the case of the erroneous values, Met Ed personnel failed to record the sample volume. (Volumes typically were 10^4 to 10^7 cc.) A volume

of 1 cc was arbitrarily assumed by the licensee yielding artificially high concentrations of Cs-137 and Co-60 (1.4×10^{-2} and 7.9^{-4} μCi/cc, respectively). This resulted in calculated dose values which are a million too high for these isotopes.

It is unfortunate that these erroneous values were reported. Nevertheless, the NRC staff believes that the Heidelberg group used poor judgment in using these values and ignoring the many other, lower values available to it. In estimating potential exposures and doses, it is properly conservative to use the highest reasonable source term. However, it is unreasonable to use a single value or set of values when the numerous other reported values, determined both before and after the highest values are consistently so much lower.

Additionally, the Heidelberg group ignored the staff's discussion of the most recent reactor building sample data (i.e., sample data through February 1980) which was available to them in the staffs draft Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere, NUREG-0662 (March 1980). This discussion (see Section 5.0, Reactor Building Airborne Activity) indicates that the latest particulate activity levels are on the order of 1×10^{-9} μCi/cc.

Finally, since the Heidelberg dose calculations are based on a fallacious source term, they, too, are fallacious.

Heidelberg Finding No. 2

Uncertainties inherent in the meteorological models and dose calculations mean that it is impossible to exclude that in the proposed purge program individual skin doses due to krypton-85 could exceed the 100 mrem limit.

Staff Comment

The Heidelberg group's assertions regarding the uncertainty of predicting dose from meteorological dispersion

characteristics at TMI are compensated for by the conservatisms incorporated in the actual purge conditions. Purging the reactor building atmosphere at TMI will be carried out using real-time meteorological measurements, containment atmosphere sampling, radiological effluent measurements, and an elaborate environmental monitoring program. Operators will control the release rate, and hence the dose rate, based on actual meteorological conditions and these other measurements. Purging would be stopped at any time that these combinations of measurements and calculations indicate possible dose values that begin to approach limiting values which themselves are well below the imposed release limits.

Thus the Heidelberg group's statement (p. 11 of the 6/12/80 report) that, given releases of Kr-85 during unfavorable meteorological conditions, "skin doses could reach 320 mrem at a distance of 0.5 miles from the stack," is incorrect and appears to have been made without knowledge of how the purging will actually be carried out.

Purging the TMI reactor building atmosphere will be *monitored* and *controlled* to assure that the dose limits specified by the Commission are not even closely approached, thus accommodating the discussed uncertainties.

Heidelberg Finding No. 3

Estimates of health damage should consider not only regional but also global population doses which are an indication of all health effects caused by the release of radioactivity. Both can be estimated only with great uncertainty. The dose effect relation is subject to wide scientific discussion. We cannot exclude that venting Krypton-85 alone could cause at least one additional cancer case (probably skin cancer) plus one case of genetic damage within the next century. However, nothing is known about a potential synergism between krypton-85 beta and ultraviolet radiation.

The results calculated in NUREG-0662 do not exclude the possibility of one cancer case in the world population within the next 100 years as a result of purging. The staff has used the most widely recognized radiation risk estimates to determine the probability of cancer or genetic effects in the 50 mile population surrounding TMI as a result of purging. The average risk of radiation induced fatal cancer to individuals in the 50 mile TMI population was estimated to be 5 chances in 100 billion. Within the world's population, the average risk to individuals, because of further Kr-85 dilution in the earth's atmosphere, would be even smaller than the already negligible risk to people within 50 miles of TMI. The global collective dose of 100 person-rem whole body dose due to Kr-85 (in the Heidelberg estimate) is minute compared to the annual global background radiation dose of 300 million person-rem. It should be noted that several independent organizations, including the National Council on Radiation Protection and Measurements, the Environmental Protection Agency, the Department of Health and Human Services, and the Union of Concerned Scientists, have also concluded that purging would result in negligible public health risks. Because of the conservatism to be used in controlling and limiting doses, even a possible synergism between beta radiation and ultra violet radiation in skin cancer induction would not be expected to change the health effects picture markedly.

Heidelberg Finding No. 4

The environmental monitoring program cannot ensure that all significant radiation doses to the community as a result of decontamination of the atmosphere of the TMI-2 reactor building atmosphere will be detected. Most measurements are not frequent enough and are not made at all in some important localities. Important pathways and radionuclides are neglected.

Staff Comment

The environmental monitoring program for the postulated reactor building purge is one of the most comprehensive programs ever developed for monitoring gaseous effluents from a domestic commercial nuclear power plant. The program incorporates the expertise and resources of the EPA, DOE, NRC, State of Pennsylvania (including trained community monitors), and the licensee. The program includes the availability of 6 mobile (3 EPA and 3 licensee) monitoring units as well as the DOE Atmospheric Release Advisory Capacity (ARAC) which will provide independent predictions of the dispersion patterns of the krypton gas. A detailed description of the monitoring program is contained in Section 8.0 of NUREG-0662 (final report, May 1980) including the number and type of radiation monitoring and sampling devices, their frequency of analysis, and the location of the measurements. An even more detailed report is given in the EPA report, "Long-Term Environmental Radiation Surveillance Plan for Three Mile Island," March 17, 1980. From the comments in the Heidelberg finding and in the body of their report, it is apparent that they had considered neither the EPA report nor the final NUREG-0662. Most, if not all of the Heidelberg group's comments and criticisms are addressed in those two reports.

The radiological environmental monitoring program will be supplemented by direct measurement via the stack monitor of all gaseous radioactive materials discharged during the purge as well as real time meteorological dispersion measurements (taken at least hourly) from the onsite meteorological tower. Additionally, the reactor building atmosphere will be periodically sampled during the conduct of the purge to verify the releases measured directly by the stack monitor. In order to verify that no significant amounts of radionuclides other than Kr-85 are released to the environment during purging, samples from the established network of eighteen operating stations will

continue to be collected. Samples in the downwind sector will be collected every day, rather than the three times per week under normal conditions. In addition at least one sample from "control" stations in each quadrant not in the downwind trajectory will be collected and analyzed on a daily basis.

Heidelberg Finding No. 5

As considerable health damage could be caused by venting the atmosphere of the TMI-2 reactor building, we strongly advise against this procedure. The report of the Union of Concerned Scientists concludes that decontamination is not as urgent as stated by Met Ed and NRC. Therefore, we strongly recommend that the alternative methods for decontamination proposed by UCS and Prof. Morgan be used.

Staff Comment

The NRC staff disagrees that purging the TMI-2 reactor building atmosphere could result in "considerable health damage." NUREG-0662, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," provides an extensive technical basis for the NRC staff's recommendation to purge the reactor building atmosphere.

EXCERPT FROM GENERAL PUBLIC UTILITIES, INC's, "PLANNING STUDY FOR CONTAINMENT ENTRY AND DECONTAMINATION," JULY 2, 1979

6.0 *CONTAINMENT ATMOSPHERIC FILTRATION AND PURGING*

6.1 *Existing Situation and Design Objectives*

6.1.1 Containment Atmosphere Conditions

The release of large quantities of reactor coolant to the containment coincident with significant fuel failure has led to extremely high airborne levels within the containment. These levels must be reduced as much as possible to minimize operator exposures during containment decontamination activities. Table 6-1 presents a summary of results from numerous containment air samples and the MPC which is allowed in the air in controlled spaces to indicate the magnitude of the problem. The primary contaminants are miscellaneous fission products, noble gases, iodine, cesium, and tritium, all of which must be treated and/or released in a controlled manner to assure the minimum impact on the public health and safety.

It is apparent from analysis of Table 6-1 that the actual value of the specific activity of each of the primary contaminants is not accurately known. A reasonable consistency in the order of magnitude of the primary radioisotopes does exist and this information was considered sufficient for preliminary planning. More accurate and precise knowledge of the containment atmosphere will be essential prior to the start of and during cleanup operations so that an accurate evaluation of the impact of these releases can be made.

Although the bulk of the containment atmosphere radioactivity would be removed prior to containment entry there will still be levels of airborne contamination inside

the containment throughout the decontamination activities. This additional airborne activity is expected from resuspension of radionuclides which had plated out and from the dislodging of radioactivity during remote and manual decontamination activities.

6.1.2 Design Objectives

To evaluate and compare various system designs and operating alternatives for cleanup of the containment atmosphere, it is first necessary to establish objectives. The following objectives are considered appropriate for this aspect of the containment decontamination:

- To minimize the impact on public health and safety from containment atmosphere cleanup
- To assure that operator exposures are ALARA
- To comply with the established release technical specifications
- To minimize the impact of containment atmosphere cleanup operations on the decontamination schedule

HEARINGS ON THREE MILE ISLAND CLEANUP

FRIDAY, NOVEMBER 9, 1979

United States Senate,
Subcommittee on Nuclear
Regulation of the Committee
on Environment and Public
Works, Washington, D.C.

The subcommittee met at 9:37 a.m., in room 4200, Dirksen Senate Office Building, Hon. Gary Hart (chairman of the subcommittee) presiding.

Present: Senators Randolph, Hart and Simpson.

Senator Hart. The hearing will come to order.

Yesterday, this subcommittee ventured into largely uncharted territory. We explored the many unknowns of recovering from a major commercial nuclear accident. The trip into ths [sic] new regulatory terrain was not exactly a reassuring one.

For example, we learned that nearly eight months after the Three Mile Island accident there are still no guidelines, regulations or technical specifications from the Nuclear Regulatory Commission to guide the cleanup and recovery operations at Three Mile Island. We also learned that without such regulatory guidance the ultimate costs and duration of the operation remain very much in doubt. Further, the utility's ability and willingness to bear these costs, and to assure the continuity of this operation also are in doubt. We became familiar with the intricacies and the hazards of each step of the cleanup operation—from the initial step of decontaminating the auxiliary building water to the final crucial step of dismantling and removing the highly radioactive core.

The major lesson of yesterday's hearing, for me at

least, was the understandable nervousness of the nearby neighbors of the Three Mile Island plant. To quote the Chairman of the Board of Supervisors of Newberry Township: "Met Ed's present piecemeal approach," referring to the cleanup process, "is driving Newberry Township residents batty." Chairman Bruce Smith further stated: "A long-range, step-by-step plan could better prepare the community as well as the community leaders with the problems and dangers to be confronted with the cleanup process."

However, testimony yesterday from utility and NRC officials indicated that each side is, at least to some degree, waiting for the other to make the first move. * * *

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[pages 5-7]:

Senator Simpson.

Senator Simpson. Thank you very much, Mr. Chairman.

Yesterday, we heard expressed the sincere concerns of the residents of the local population around Three Mile Island regarding cleanup and recovery operations at the site. As Senator Hart has quoted, we had a most refreshing witness who said that up there, the piecemeal approach was driving them batty, and everyone understood what he was saying when he said that. It was certainly precise.

The testimony, on balance, underscored my belief that a new and more candid planning approach is needed by the utility and especially by the NRC to manage the recovery situation. The utility witnesses stated that a general plan for recovery and cleanup was under development, but that much of the detail would have to be developed as the recovery effort proceeded and as new and possibly changing regulatory requirements were imposed. The NRC witnesses testified that flexibility was needed to develop regulatory requirements as the recovery process moved forward. To be sure, I think some

flexibility on the part of the utility and NRC may be needed to tailor the cleanup program to the situation at the site, particularly as that situation becomes more fully known.

Nevertheless, I feel that a greater sensitivity to the needs of the local community is essential here. We are not dealing, as the Commission normally does, with a new application to built [sic] a facility. Rather, we are faced with a severely damaged plant that is now in stable condition but which poses continuing risks to the local population and to the workers at the site. And we are certainly faced with a community which is already anxious as a result of the accident and highly skeptical of the two organizations directly involved in the cleanup; that is, the NRC and the utility. Given this situation, it seems to me prudent, if not essential for the NRC to lay out in detail for full public review the standards it expects the utility to meet and the means it will use to ensure the compliance.

Mr. Chairman, we will have the Commission with us today, and I would be very interested in hearing reasons why the agency cannot say definitively what it is and is not willing to allow in terms of releases into the atmosphere and river during the cleanup operation, what the impact of those release [sic] is likely to be and what limit should be imposed for the workers and what insurances we should use to ensure the applicable standards are met. I understand that the NRC staff prepared a package of new regulatory requirements somewhat along those lines several months ago and forwarded them to the Commission. I hope that we might know the status of those propose [sic] requirements and what the Commission plans to do concerning them. As I see it, such a set of regulatory requirements properly validated through public review and comment, followed by the preparation of detailed recovery plans to meet those requirements, again subject to public scrutiny, would do much to ease the legitimate local concerns.

Mr. Chairman, the second issue of our hearing today, and one we will review carefully, is how the Commission intends to discharge its responsibilities under the National Environmental Policy Act of 1969. Again, the question seems to be whether the Commission plans a piecemeal approach to recovery or whether a more comprehensive approach to considering environmental impacts is warranted. I think the Council on Environmental Quality will be helpful in that regard.

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[pages 40-44]:

Senator Hart. What is the Commission's position with regard to the desirability or requirement of an environmental impact statement?

Mr. Hendrie. Well, certainly the cleanup of Three Mile Unit 2 [sic] has to be agreed to by the NRC, by Federal authorities. It is clearly a major action in the way that term is used in connection with NEPA, and it needs an impact statement. I have talked this past week to Chairman Speth and CEQ officers—and I see we have Mr. Yost with us this morning—about going through that environmental analysis process in a way which fully satisfies the intent of the legislation but also is consistent with the time scales and need for action in the decontamination program, and we are still at a fairly preliminary stage in terms of mapping out that course of action.

Senator Hart. I guess we are back to where we were yesterday in terms of how much time we have for some of these things, and I would like to get your judgment on public and workers' health and safety implications of various time frames and various delays. Let me just run through a series of them. First of all, your judgment on the risks of delaying the resolution of the radioactive atmosphere presently contained in the reactor building and how soon you think that is going to have to be done to protect the public health.

Mr. Hendrie. I think the sooner that it is done, the better. I don't think there is any pressing danger or urgent risk. That containment has stood the test well, and I have no doubt it will continue to do so. On the other hand, the longer these materials are allowed to remain in gaseous or liquid forms, simply loose in the containment building, the more chance there is that somebody will open the wrong valve or something else will happen and some of it will get out. It is a concern of this kind in connection with the tank in the auxiliary building and the fact that it was just filling up and the prospect was for having to start filling tanks in the other unit that led me to become this concerned back before we started the EPICOR stay to begin to pound on the table and say we have got to move, it is going to the dimension of an emergency situation.

Now the materials within the containment, the krypton in the atmosphere and material there in the water, I think I certainly wouldn't classify it as an emergency situation. As I say, I think that containment will keep them in there in good shape for a good long time in [sic] necessary. But it just adds some increment, however small it may be, to the public risk to go for extended periods of time without processing. We need to get on with it.

Senator Hart. On the one hand this, but on the other hand that. We heard testimony yesterday from the people in the area who feel that they haven't been dealt with as candidly as possible. I understand on the one hand this, but on the other hand that. But what we have got to know and provide to the people is a sense of when. So I guess what I am asking is a little more specific question.

Mr. Hendrie. A schedule hasn't been developed.

Senator Hart. When will it be developed?

Mr. Hendrie. I expected [sic] Met Ed is due to come in with their layout of where they hope to go and some approximate scale of time they would hope to accomplish

it; I judge from the discussion yesterday that that was pretty close in.

Senator Hart. Well, it was late as hell, frankly, and it is awfully hard to pin anybody down on this. Everybody says they are waiting for somebody else. Frankly, I am on the side of that second panel yesterday. I don't live there, but if I did I would want the Government of the United States and the State of Pennsylvania and the utility to begin to give me a little more specific answers instead of they are going to move and then we are going to move, and on the one hand this, but on the other that. I think what people want is a sense of certainty, and I guess what I want is a sense of when they are going to have a sense of certainty. Are we talking about a month? Three months? Six months? Or a year?

Mr. Hendrie. There ought to be a reasonable layout, I would think, available on a preliminary basis in several months.

Senator Hart. Several months.

Mr. Hendrie. I think that that will not become sort of a semi-firm schedule for a longer time than that simply because it becomes involves [sic] in the analysis requirements under NEPA; it is part of making those decisions. I will point out when the staff publishes its environmental impact statement, which is inevitably going to take some time, that that still dosen't fix the schedule in an absolute, concrete way, because as you take each of these steps, you then learn a further piece of information, and after we have done whatever is necessary to do with the containment atmosphere, the radioactive material in the containment atmosphere, good, now we can start processing the water. But the schedule on the processing of the containment water will be contingent on how the gas processing goes. The entry to the containment will be contingent on the processing of water. Any extended entry to the containment will be contingent on how well the cleanup of the residual materials on the wall of the containment go. And all

of these affect how soon you might get down to the primary system and talk about opening the vessel and getting the core out.

So people are simply going to have to recognize there are certain variablities in these schedules. I think the point your are punching, and I must say with, I regard, good justification, is here we are some seven months or so on down the line after we collected ourselves after the accident and there is not that at least preliminary laying out of how do we get from here to there, "there" being decontamination.

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[pages 54-55]:

[Mr. Hendrie]: So I don't regard it as a particularly perilous situation at all.

You asked how long do we have and what are the risks of human error. I think in view of what has happened and the care which we believe everybody is taking with this machine, the risk of human error is pretty small. I say that in full humility, recognizing this is the precise machine in which human error was exercised to put us in the situation.

Senator Hart. The last part of the situation was how long do we have? Can you keep it a year? Five years? Ten years?

Mr. Hendrie. I think all of those time scales—I would think that times like five to ten years would just be unconscionable. It is not necessary from an engineering and health physics standpoint. To have that just sitting there with a damaged core endlessly would be unspeakable. But in terms of some technological driving point which says it is seven years, we are really getting to the point where the remaining cladding is all going to fall down.

Senator Hart. So somewhere between one and five years is the level of unconscionability and unspeakability.

Mr. Hendrie. Well, it seems to me getting anywhere near in less than a year is practically out of the ques-

tion, and if we haven't got it out of there in five years, why that really will be pretty poor performance.

Senator Hart. So one to five years.

Mr. Hendrie. Yes.

Senator Hart. Do we know what we are going to do with it when we get it out?

Mr. Hendrie. The core debris, the radioactive core debris will be placed in heavy shielded casks, and then we will look around and say, good, now what do we do with the casks? It is good to get it in the shielded casks, that is the right thing to do, it is a lot less likely to be harmful there than elsewhere. But that still isn't the full answer. Then there are about two options in the time frame we are talking about. One of the them is to keep the casks on site for some period that I can't estimate for you, and the other one would be for one of the major government processing centers to accept those casks, where they would remain, again for a time I can't estimate for you, until we finally get on to solving the high-level waste problem in this country.

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EXCERPTS FROM U.S. NUCLEAR REGULATORY COMMISSION'S RESPONSE TO LETTER FROM SENATORS HART AND SIMPSON, JANUARY 2, 1980

[pages 2-3]:

QUESTION 3:

Normally the regulations for an operating reactor allow release of certain quantities of radiation to the river and the atmosphere. Do you plan to adhere to these regulations for the cleanup?
If not, what alternative do you propose and why?

ANSWER:

The technical specifications for releases of radioactive materials from operating reactors are based on guidelines Appendix I to 10 CFR Part 50. Appendix I to 10 CFR Part 50 provides numerical guides for design objective and limiting conditions for operation to meet the criterion of "As Low as is Reasonably Achievable" and which also meets the standard set in EPA's regulation 40 CFR 190 concerning radiation dose to the public from the uranium fuel cycle. We will require that during cleanup and recovery operations the releases of radioactive material to the environment are maintained within the limits specified in Appendix I to 10 CFR Part 50. However, the Commission may determine that if the public interest requires, additional measures be taken for the protection of the public health and safety such as a requirement for one of the cleanup options mentioned above. The efficacy of such additional measures will be an integral part of the Environmental Assessment.

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EXCERPT FROM GENERAL PUBLIC UTILITIES, INC.'S RESPONSE TO QUESTIONS FROM THE U.S. NUCLEAR REGULATORY COMMISSION, JANUARY 4, 1980, PAGE 6

Disposal of Krypton-85 in the Containment Building is a prerequisite for Reactor Building decontamination. Delays in RB decontamination represent potential safety hazards that cannot be quantified without a better understanding of the actual core configuration. The additional safety hazard arises from the increased potential for reactor core deterioration the longer the core remains in an unexamined state. The longer it takes to gain access to the Reactor Building and determine the true state of the primary coolant system, reactor pressure vessel, core intervals and reactor fuel, the longer the uncertainty remains as to what the ultimate risk is for further releases of radioactive nuclides from the facility. Even without this quantified risk, however, it is believed that purging the Reactor Building of Krypton-85 represents the most prudent path to disposal of the Krypton-85 radioactive noble gas. The potential for delays represented by the other options represent additional risks of core deterioration that regardless of the magnitude, justify purging the reactor building atmosphere as soon as possible. The true answer to this question cannot be determined, in fact, until the Krypton-85 is disposed of and access is gained to the reactor building. Only then can the true safety hazard and radiation dose to the work force be assessed. It is not prudent to believe that the reactor core will remain in a safe condition indefinitely.

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EXCERPTS FROM REPORT OF THE U.S. NUCLEAR REGULATORY COMMISSION'S SPECIAL TASK FORCE, "EVALUATION OF CLEANUP ACTIVITIES AT THREE MILE ISLAND," FEBRUARY 28, 1980

[page IV-5]:

C. *What are the current criteria for conducting cleanup activities?*

The current criteria are contained in the Commission's Order of February 11, 1980. This Order establishes new Technical Specifications governing operation of the facility in what is called a "Recovery Mode." The specifications for release of radioactive material from the site and for occupational exposures are consistent with (and no more stringent than) existing Commission regulations, guidelines and criteria applicable to a normal operating facility. However, the Order "prohibits venting or purging or other treatment of the reactor building atmosphere, the discharge of water decontaminated by the EPICOR-II system, and the treatment and disposal of high-level radioactively contaminated water in the reactor building, until each of these activities has been approved by the NRC." These prohibitions effectively preclude the planned release of any radioactive liquid or gaseous material from TMI-2 without prior Commission approval. Low-level solid waste (rags, clothing, etc.) generated during cleanup operations in the auxiliary building are permitted to be transported off site.

Notwithstanding the February 11, 1980 Order, there continues to be a lack of well-defined criteria to govern the day-to-day activities that involve handling, and planned or unplanned releases, of the materials covered by the prohibitions. Such criteria, which could be based on existing Technical Specification limits with an upper bound on allowable total quantities to be released, are essential to the continued conduct of the cleanup operation. The task force found no evidence that the Staff or the licensee

was preparing such interim criteria for Commission consideration. Without them, the cleanup operation is being unnecessarily prolonged, and minor unplanned releases that would be inconsequential in a normal operating plant are elevated to an unwarranted significance. An example of the former is the perceived need to obtain Commission approval to open the outer personnel air lock door which would release about 0.05 curies of Krypton-85 (see Appendix 4). An example of the latter is the occurrence on February 11 in which the incidental off-gassing of about 0.3 curies of Krypton-85 from some leaked primary system water caused considerable public concern. To put these releases in perspective, TMI-2 has been releasing between 65 and 80 curies of Kr-85 per month in recent months; a normal operating facility of this type may release over a thousand curies of radioactive gasses per month. In 1978, TMI-1 released an average of 1300 curies of radioactive gasses per month.

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[page IV-9]:

G. *What is the relative priority of cleanup for NRC and the licensee?*

The actions of the NRC and licensee shortly after the March 28 accident had high priority in each organization (e.g., design and installation of the EPICOR II system). However, this initial high priority has eroded as time elapsed.

The licensee's senior vice president, Mr. Robert Arnold, stated to this task force that, due to financial difficulties, cleanup of TMI-2 is fourth priority. GPU has placed ahead of TMI-2 cleanup in their list of priorities: maintenance of a safe condition at TMI-2; preparations for restart of TMI-1; and refueling and restart of the Oyster Creek plant. Mr. Arnold further stated that if the priority of TMI-2 cleanup were raised above that of TMI-1 and Oyster Creek refueling and restart, an accelerated

TMI-2 cleanup schedule could be pursued. He pointed out that GPU/Met. Ed are concerned about the Pennsylvania Public Utility Commission's actions on proposed rate increases. Mr. Arnold expressed concern that unfavorable action by the PUC will further exacerbate Met. Ed's financial position, causing further delays in TMI-2 cleanup.

It is the Task Force's opinion that NRC has also placed a low priority on TMI-2 cleanup, relative to review of operating plants, developing and implementing the TMI Action Plan, and taking action on near-term operating licenses. A very limited staff has been assigned to the TMI Support Group both at Headquarters and on site. Temporary assignments of staff continue to be made to the on-site group which has a permanent core group of only 3 to 4 professionals. Although the Commission itself has not specifically placed a lower priority on reaching decisions for TMI-2 cleanup activities, the Commission's lack of ensuring that definitive cleanup criteria are established and the need for Commission approval of all activities which could provide releases has led to the staff's perception that the Commission considers this to be a low priority activity.

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[page IV-22]:

O. *What are CEQ's current views on the NRC's NEPA responsibilities for cleanup actions?*

The Task Force met with members of the CEQ staff to obtain its views on the Commission's responsibilities under NEPA. CEQ staff views NRC's approval of total cleanup operations at TMI as a major federal action which legally obligates the Commission to prepare an Environmental Impact Statement. By total operations, CEQ staff means actions extending from the reactor cleanup through to ultimate disposal of the wastes result-

ing from that cleanup.[1] Until that Statement is prepared, CEQ staff believes that NRC approval of certain actions, such as purging the radioactive gas from the containment. would be a segmentation of the entire clean-up program in a manner inconsistent with NEPA. However, CEQ staff recognizes that NEPA permits the NRC to approve certain actions which could result in limited radioactive effluents prior to completion of the Programmatic Statement. These actions include steps to obtain more information and data relevant to further clean-up activities, and actions necessary to maintain TMI in a safe and stable condition. Maintenance to ensure continued operation of the fan coolers inside the containment was specifically referred to as an example of permitted interim maintenance operations.

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[1] The task force was informed that, under current plans, the PEIS would cover delivery of the waste to a waste disposal site, but would not address the environmental impact of disposal of the waste at that site.

EXCERPT FROM U.S. NUCLEAR REGULATORY COMMISSION'S RESPONSE TO QUESTIONS FROM SENATORS HART AND SIMPSON, PAGES 11-12

QUESTION 3:

Please include regulatory guidelines that will remain stable over the period of the cleanup, consistent with the Commission's responsibilities to protect the public health and safety and the environment.

ANSWER:

The staff anticipates that existing Commission regulations, guidelines and criteria applicable to a normally operating facility, will continue to be applied to cleanup activities at TMI-2. However, we recognize that although certain activities would otherwise be permitted at a normally operating facility, it may be warranted, in the public interest, to prohibit them at TMI-2 even though they could be conducted in full compliance with existing effluent limitations in the operating license or NRC regulations, until further evaluation of them is undertaken. At this time, we have identified several such activities: disposal of water decontaminated by EPICOR-II system, treatment and disposal of high-level contaminated water now in the reactor building, and venting or other treatment of the reactor building atmosphere. An example of how such a further restriction affects the cleanup plan is shown in our analysis of the cryogenic case (see response to Question 1). For the other three cases we assumed that if any proposed method of treatment and disposal meets existing Commission regulations, guidelines, and criteria for operating reactors, the method would be acceptable. For the cryogenic case we assumed that even if venting the reactor building would meet criteria, it would be prohibited and that an alternative method, which would further reduce radioactive effluents (such as cryogenic processing of gases), would be necessary.

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EXCERPT FROM TRANSCRIPT OF PUBLIC HEARING CONDUCTED BY THE U.S. NUCLEAR REGULATORY COMMISSION, MARCH 19, 1980, PAGE 16

MR. COLLINS: Well, let me follow up on that. As a result of many of those conversations that occurred that day, there was a meeting in the White House between DOE and NRC—

(Crowd interrupts.)

MR. COLLINS: —At which time it was resolved that those community monitoring programs and an involvement of you officials would be undertaken. Last week we met with Mayor Reed here in Middletown to discuss that very program with him, and we have plans in a week to initiate a meeting with you people to discuss that.

SPEAKER: Why just Middletown?

MR. COLLINS: I'm talking about all of the local officials in the surrounding areas.

SPEAKER: I was never invited.

MR. COLLINS: No. I said the meeting is being established. I'm not saying that we had that meeting.

(Crowd interrupts.)

MR. COLLINS: Your suggestion did not go by the board. I did not ignore it.

SPEAKER: Maybe we could help Mr. Collins. Let's take a vote. Now, careful.

All for releasing the crypton [sic], applaud.

(No response.)

SPEAKER: Those against releasing the crypton [sic].

(Applause.)

EXCERPT FROM TRANSCRIPT OF PUBLIC HEARING CONDUCTED BY THE U.S. NUCLEAR REGULATORY COMMISSION, MARCH 21, 1980, PAGES 16-18

CHAIRMAN AHEARNE: Go ahead.

MRS. PRELESNIK: If you don't talk too long.

REV. VASTINE: I won't talk to [sic] long, but I want to apologize for talking too long because I haven't had the chance to talk to you ever and I probably will not again.

I am saying, friend, that you know if there is violence, God help us that there won't be, in the Harrisburg area, if there is eruption of the population there, my dear friend, in terms of the rush of emotion to do something, to do something that is untoward, I say, my dear friend, that it is in your hands.

DR. COLMAN: Let me try to pick up here if I can.

CHAIRMAN AHEARNE: I think we both perhaps have some roles in that. Go ahead, Doctor.

DR. COLMAN: I think perhaps Reverend Vastine is picking up on a point that I wanted to try to emphasize here.

The fact that we are here indicates that there is a problem and the fact that we are having to gather our own technical information and present it to you indicates that there is a problem. And the fact that there were so many people as angry as they were in Middle Town on Wednesday and I gather in Elizabeth Town last night indicates that there is a problem. And I think the problem really is one of distrust, absolute distrust for the variety of authorities who have been hoping to be in control in the matter of TMI; that includes Met. Ed., that includes the NRC.

One of the results of that is that we need assurance from independent experts that the new information which we are being fed is, in fact, accurate. And I think increasingly we are capable of drawing our own conclusions once we have the facts in front of us. But I think that what Reverend Vastine was alluding to is, I guess really it is the main point I want to try to make here.

We have felt out of control of our own lives in that area ever since the 28th of March last year. Every time we are told that something is about to happen, although which there is no real assurance of our safety, we again feel out of control. Every time we here [sic] that there is the most minimal leak, as in yesterday's leak, we feel again that we are out of control.

I was at the meeting in Middle Town on Wednesday, just for a short time because I got there late. One of the clearest things that was coming across there was that the people in that area seemed to be sick and tired of listening to or speaking to people from the NRC who are incapable of making decisions there onsite. The clearest message that that group got across, other than its anger, was they want you there. They want you there before any decision is made on venting and want you to make it in full view of the strength of the opinions that are held in that area.

I have been tracking sort of the tone of meetings ever since the one in Middle Town that Mr. Gilinsky was at with Congressman Ertle. It was kind of a watershed meeting. It became clear, I think, at that point of the total emotional reaction of people in the area and Mr. Gilinsky gave some indication of hearing that and that heartened us to a degree.

I am getting scared. As a psychologist I am getting scared. Those meetings are rowdy. Middle Town is a reasonably rough town as they go. I was on my way over to the Liberty Fire Hall the other night to go to those meetings and I was warned by some high school kids, you don't want to go there mister, this is turning into a heavy scene and they were right.

It is monotonic. It just seems going up. And I think unless some mechanism can be developed so the people in that area have a realistic understanding that they are gaining control over the situation there by having a clear effect on the Commission about its decision, that anger level is going to keep on going. Wherever it goes, I don't want to speculate, but it is not healthy, it is not good.

EXCERPT FROM U.S. NUCLEAR REGULATORY COMMISSION STAFF'S "FINAL ENVIRONMENTAL ASSESSMENT FOR DECONTAMINATION OF THE THREE MILE ISLAND UNIT 2 REACTOR BUILDING ATMOSPHERE," NUREG-0662, MAY, 1980, PAGE 1-1

1.0 *Summary and Recommendation*

The NRC staff has prepared this summary of the Final Environmental Assessment for those who prefer to follow the main themes of the assessment without referring to the technical descriptions, calculations, and other data that provide the foundation upon which the staff's recommendation is based.

The krypton-85 (Kr-85) released into the reactor building during the accident on March 29, 1979, [sic] must be removed from the building so that workers can begin the tasks necessary to clean the building, maintain instruments and equipment, and eventually remove the damaged fuel from the reactor core. Those tasks must be performed whether or not the plant ever again produces electricity. Radiation from the krypton gas, although thinly dispersed through the reactor building atmosphere, nevertheless poses a threat to workers who would have to work in the building for prolonged periods.

This Final Environmental Assessment (NUREG-0662) presents a discussion of the information considered by the NRC staff in arriving at its recommendation that the preferred method for removing the krypton-85 from the reactor building is by a kind of flushing process by which the gases would be pushed out of the building and fresh air pulled in.

The Metropolitan Edison Company (the licensee) on November 13, 1979, asked the NRC staff for permission to purge or remove the reactor building atmosphere containing the krypton-85 to the outside (Ref. 1). In March 1979, the NRC staff published the draft version of this

Environmental Assessment (NUREG-0662) and two subsequent Addenda for public comment (Ref. 2). The staff has received approximately 800 comments on the draft Environmental Assessment. Of these, approximately 195 responses generally supported the purging of the reactor building, approximately 500 opposed it, and the remaining responses were either recommended alternatives for removing the krypton or comments that took no position on the staff's recommendation. Substantive comments received by the NRC staff will be printed in Volume 2 of this Assessment.

From this process have emerged some NRC staff conclusions on four basic aspects of dealing with the reactor building atmosphere:

—The potential physical health impact on the public of using *any* of the proposed strategies for getting rid of the krypton-85 is negligible.

—The potential psychological impact is likely to grow the longer it takes to reach a decision, get started, and complete the process.

—The purging method is the quickest and the safest for the workers on Three Mile Island to accomplish.

—Overall, no significant environmental impact would result from use of any of the alternatives discussed in this Assessment.

* * * * *

[SEAL]

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

May 1, 1980

Docket No. 50-320

Memorandum for: Wm. H. Regan, Jr., Chief
Siting Analysis Branch, DE

From: Donald P. Cleary, Section Leader
Regional Impact Analysis Section
Siting Analysis Branch, DE

Subject: TMI-2 ATMOSPHERIC DECONTAMINATION

On April 21, 1980, I received a telephone call from Dr. Bruce P. Dohrenwend, Head, Social Psychiatry Research Unit, Columbia University, responding to your letter of April 9, 1980, which transmitted NUREG-0662 "Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", and which requested comments he might have regarding psychological stress associated with atmospheric decontamination alternatives. Dr. Dohrenwend's comments are primarily directed toward local citizens needs to be informed and to participate in the decisions on atmospheric decontamination. He emphasized the relationship between information and participation and the level of psychological stress within the population.

Dr. Dohrenwend found NUREG-0662 and Addendums 1 and 2 inadequate public information documents in several respects. There is insufficient information provided on the relative risks and consequences of the decontamination alternatives. The reader is left with the impression that engineering considerations, rather than possible human consequences, are to determine the selection of an alternative. The central problem of maintaining an ability

to monitor and control the reactor core needs to be more fully explained in terms of the potential risks to the population if this ability is not maintained. He emphasized the urgency of clearly informing the local population of the risks to the general public of not decontaminating the atmosphere quickly or not decontaminating the atmosphere at all. Risks and potential consequences need to be presented within a probabilistic framework which can be comprehended by the average resident of the area.

Dr. Dohrenwend stated that NRC should intensify its efforts to inform the public and to allow the public to play a more active role in deliberating the relative merits of the atmospheric decontamination alternatives. We should especially communicate with and involve those who are representative of the whole community, local elected official, individuals from the media and from representative community groups. In terms of representation, greater weight should be given to residents closer to TMI, especially within five miles as this group appears to be under the greatest stress. To achieve the most meaningful communication and involvement he suggested establishing a mechanism whereby a local consensus can be developed on the most acceptable atmospheric decontamination alternative. Such an effort should be undertaken quickly and should be assisted with the following:

—a summary of the findings of the various studies, of stress, altitudes [sic] and perceptions of the local population toward TMI;

—a thorough and clear explanation of the threats associated with each of the alternatives; and

—heavy reliance on outside experts, who are accepted as neutral, to explain and interpret technical and scientific information required to understand relative risks and consequences.

Dr. Dohrenwend emphasized his confidence that if citizens are given adequate facts and responsibility in the decision process they will act rationally.

/s/ Donald P. Cleary
DONALD P. CLEARY
Section Leader
Regional Impact Analysis Section
Siting Analysis Branch
Division of Engineering

cc: B. Dohrenwend

EXCERPT FROM TRANSCRIPT OF PUBLIC HEARING CONDUCTED BY U.S. NUCLEAR REGULATORY COMMISSION, JUNE 5, 1980, PAGE 58

COMMISSIONER BRADFORD: By "unwarrantedly long" you are saying—

DR. BAUM: I would think anything over three or four or five months would probably be getting to the point of being too long.

You have to also remember that as long as the plant remains unstable, and the uncertainty continues, that characterizes it now, the possibility for accidental leakage remains. Those kinds of things are stressers.

COMMISSIONER BRADFORD: That is the real point, I take it. You are not talking so much about anxiety related, solely related to Krypton, as anxiety related to the plant?

DR. BAUM: That is a primary source, yes.

CHAIRMAN AHEARNE: Any other questions of this gentleman?

COMMISSIONER KENNEDY: Did the—the other consultant who is here, did he want to add anything?

VOICE: That basically summarizes it.

CHAIRMAN AHEARNE: Fine. All right. Bernie?

DR. SNYDER: I would like to go on to the last slide. We'll try to move along a little faster.

(Slide.)

CHAIRMAN AHERANE (sic): It is a very important subject. There is no rush.

EXCERPT FROM TRANSCRIPT OF MEETING OF ADVISORY COMMITTEE ON REACTOR SAFETY, PAGES 5-7

Therefore, in order to get the venting over as soon as possible, I believe, it appropriate to allow the waiving of the current tech spec values. Draft orders are before us. I hope we can make decisions today on both of those issues.

Mr. Bickwit, would you care to summarize the two orders you have prepared for us?

MR. BICKWIT: The first order would grant permission for the venting in accordance with the conditions prescribed by the staff in its recommendation. The situation that you face from a legal matter is that the licensee may vent only if it receives approval from the NRC.

The first order would grant that approval, subject to the conditions imposed by the staff. It poses three questions which will have to be decided by the Commission. These are listed toward the bottom of page 2 of the order.

It states that the Commission must decide whether there is "sufficient need for prompt decontamination of the containment atmosphere to justify going ahead prior to completion of the programmatic impact statement."

It must also "decide whether the decontamination method recommended by the staff can be carried out consistent with the Commission's statutory mandate to ensure adequate protection of public health and safety"; and three, "whether the environmental review has met the requirements of the National Environmental Policy Act."

The order goes on to deal with each of those questions and comes to the conclusion that each of them can be resolved in a way which will permit the action which the staff recommends.

The second order is a modification, a temporary modification of the license which would relieve the licensee

from certain tech spec requirements. Because it is an amendment to the license, an opportunity for a full adjudicatory hearing is offered to those who could be adversely affected by the order.

The finding is made, however, that there are no significant hazards, [sic] considerations involved in the issuance of this order. Therefore, the required hearing, if held, would be held after the fact of the permitted actions.

CHAIRMAN AHEARNE: And incorporated into the already scheduled hearing?

MR. BICKWIT: That is right. We presently have a proceeding in which there have been requests for hearings with respect to changing the original tech specs for this license. That hearing has not been granted at this point. This order provides that if that hearing is granted, and if a hearing is granted under this order, that the two would be consolidated.

CHAIRMAN AHEARNE: All right.

COMMISSIONER GILINSKY: Could you summarize the modifications in the second order?

MR. BICKWIT: Yes. The present tech specs, as I understand it, would not permit the venting either by a fast purge or by a slow purge. The current tech specs stand in the way of both of those actions. The fast purge is, as I understand it, inhibited by the releases that can be taken—that can be made in a sudden fashion, whereas the slow purge is inhibited by the quarterly release limits.

CHAIRMAN AHEARNE: You mean that doing it in a given quarter—completing it in a given quarter?

MR. BICKWIT: That's right. So that these particular tech specs do not stand in the way of either such action. I think I ought to ask Bernie Snyder, who has recommended the precise limits that are incorporated in this order to elaborate on that—what those limits are.

DR. SNYDER: On page 3 of the second order, the limits appear, which would be substituted for the instantaneous and quarterly average tech spec limits, which are 2.1.2 in the reference there.

Basically, they will be Appendix I limits, which are (a) and (b) there. Fifteen millirem skin dose, and five millirem total body dose.

CHAIRMAN AHEARNE: Appendix I limits also meet the EPA guidelines?

DR. SNYDER: Yes. Item (c) was added because Appendix I does not have a rate limitation. We felt it would be advisable in order to assure meeting, especially, (a), the skin dose; that there would be a 20 percent or three millirem per hour limit.

Measurement of Strontium-90 Released in Venting of the TMI Unit 2 Containment Atmosphere: June 28 - July 11, 1980

Joan Harvey, Ph.D.
Richard G. Piccione, Ph.D.
Daniel M. Pisello, Ph.D.

This study was conducted under the auspices of Accord Research and Educational Associates, Inc.

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Between June 28 and July 11, 1980, Metropolitan Edison (Met Ed) vented the containment building of their Three Mile Island (TMI) Unit 2 nuclear reactor. Prior to the venting Met Ed reported [1] that the building atmosphere contained approximately 57,000 curies of krypton-85, a few curies of tritium, and far smaller amounts of other isotopes present as suspended particulates, e.g., radioactive cesium and strontium. The utility claimed that the amount of suspended particulate radioactivity was very small and that the exhaust stack filtration system was good enough to keep emission of radioactive particulates below detectable limits. The NRC decided to waive the "required" environmental impact statement for the venting. The NRC further compromised public health by temporarily suspending the federal regulations that limit the concentration of airborne isotopes that may result offsite from plant releases. Finally, the releases were made without the NRC requiring immediate check

[1] Letter from W. E. Riethle, TMI Environmental Control Manager, dated October 8, 1980. Data excerpted from Met Ed in house report.

on the amount of beta activity that was being released in the form of suspended particulates, specifically leaving them blind to strontium-90, one of the most abundant and lethal isotopes in the reactor.

Accord Research and Education Associates (AREA) set up 24-hour monitoring in the field during this entire two-week period, to measure radiation levels and collect air particulate samples in the vicinity of TMI. AREA detected the released krypton as far away as two miles from the plant and often observed ground level concentrations of krypton-85 substantially greater than the maximum permissible concentration (MPC) of 300,000 picocuries per cubic meter. In addition, AREA sampling of air particulates yielded a positive result for strontium-90, indicating that the release of this hazardous isotope was at least one million times greater than what the utility had estimated as possible.

Radiation levels were measured with a thin window Geiger-Mueller "pancake" probe connected to a Victoreen "Thyac III" portable rate meter. The audio output of the rate meter was fed into a digital accumulator-timer. This arrangement detects changes in the count rate of 10 counts per minute (cpm), using a one minute counting period. The background count rate in the Three Mile Island area consistently averaged around 30 cpm. We converted our excess counts above background to krypton concentration using a calibration factor determined from laboratory experiments with a similar detector performed at Pennsylvania State University. These experiments yielded 310 cpm above background per microcurie of krypton-85 per cubic meter.[2] In addition, comparison of measurements made in the field by this Penn State group with measurements made by the AREA group at the same time and location confirmed our use of this calibration factor.

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[2] Jester, W.A., "Evaluation of radiation monitor effectiveness for detection of krypton-85," report from Breazeale Nuclear Reactor, Pennsylvania State University, June 1980.

Air particulate samples were collected on one-inch diameter Millipore membrane filters (pore size 0.45 microns), at a flow rate of 10 liters per minute. After aging for several weeks, each filter was counted for gross beta activity using a low background thin plastic phosphor scintillation detector. Subsequently, all filters were combined and analyzed for gamma emissions using a Ge(Li) detector. Finally the combined filters were subjected to radiochemical analysis for strontium-90 and strontium-89, yielding the positive result discussed below.

Twenty-four hours daily throughout the TMI venting, two-man teams in the field tried to locate the point of maximum ground level activity. This point is found directly downwind from the exhaust stack and somewhat further from the plant than the point at which the spreading cloud or "plume" of effluent gas and aerosol first reaches the ground. Low-lift helium balloons were released frequently both up- and downwind of the stack in order to study the local wind patterns and locate the plume centerline. Air particulate samples were collected in the plume at the point of maximum ground level activity, and that activity was recorded continuously. While one two-man team tended the air sampling pump and recorded radiation levels during sample collection, a second team continued to survey the surrounding area with another radiation detector to verify that the pump had indeed been set up at the point of maximum ground level activity and to detect, as quickly as possible, any shift in the location of this maximum.

Figure 1 shows the measured ground level activity averaged over one hour intervals for the entire monitoring period. Gaps in the graph indicate periods during which no data was recorded, e.g. on July 2 there were no AREA monitors in the field. The NRC-specified maximum permissible concentration for krypton-85 was exceeded for several hours around midnight June 30, July 3 and July 5 and for ten daylight hours on July 8.

Our ground level measurements of krypton-85 concentration provided an estimate of the rate and pattern of releases from the reactor. Using a simple atmospheric dispersion model [3] we calculated a release rate of 100-150 curies per hour for most of the daylight hours of June 30-July 7. This value is consistent with the utility's data for that period, available through the NRC.[4] However, for late night and early morning hours during this period and for the daylight hours of July 8 we calculated release rates 3 to 4 times higher. These higher release rates were acknowledged only for the daytime releases on July 8. No release-rate data has been made available by the utility or the NRC for nighttime venting.

The high rate of nighttime venting is evidenced by the peaks of activity observed around midnight on June 30, July 3 and July 5. The absence of such midnight peaks on other nights is probably due to a high degree of atmospheric stability and low wind speed. On those nights these conditions caused the plume to rise very high resulting in low ground-level activity. Other periods of low activity in Figure 1 may be due to the occurrence of similar atmospheric conditions, interruptions in the venting, or the fact that the monitoring teams were not in the centerline of the plume. For example, it was impossible to reach this line when the wind was blowing down the river.

Figure 1 also shows the time periods during which air particulate samples were taken. The volume of air sampled and the amount of krypton-85 in each sample is shown in Table 1 for each filter. A total of 6.3 microcuries of krypton-85 in a sampling volume of 51 cubic meters passed through the set of 12 filters. No filter disc

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[3] Turner, D.B., "Workbook of atmospheric dispersion estimates," Office of Air Programs, Research Triangle Park, United States Environmental Protection Agency, 1970. AP-26.

[4] NRC purge status reports from Middletown Office, 29 June-9 July, 1980.

showed gross beta activity above the detection limit of 1.2 picocuries. The average gross beta background in the Harrisburg area is 0.02 picocuries per cubic meter, reported as cesium-137.[5] Thus background gross beta activity deposited on each filter is well below the detection limit.

The gamma scan of the combined filters showed no radionuclides above the detection limits shown in Table II. However, radiochemical analysis of the combined filters for strontium-90 yielded 0.95 ± 0.36 picocuries or .018 picocuries per cubic meter of sampled air. This value is 18 to 50 times larger than the local background concentration from global fallout.[6] This result indicates an average strontium-90 to krypton-85 activity ratio in the effluent of 1.6×10^{-7}. According to Met Ed's reported containment atmosphere inventory given in Table III, the maximum ratio of strontium-90 to krypton-85 in the plume, assuming no filtration at all, is 2.1×10^{-10}, approximately 760 times less than our result. Assuming the claimed particulate filtration efficiency of 99.98%, AREA calculates that Met Ed released 3.8 million times as much strontium-90 as they had originally predicted possible.

Measured gross beta activity for individual filter discs is consistent with the result of the strontium analysis and provides an upper limit to the ratio of gross beta activity to krypton-85 activity of 2.0×10^{-6} in the filtered air. This limit is consistent with the gamma analysis in Table II.

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[5] Office of Radiation Programs, Quarterly Report: Environmental Radiation Data, United States Environmental Protection Agency, Eastern Environmental Radiation Laboratory, Montgomery, Alabama, Report 19-20, April, 1980.

[6] Alan Smith, United States Environmental Protection Agency, Las Vegas, Nevada, personal communication, *and* Environmental Measurements Laboratory, Environmental Quarterly, October 1, 1980, EML-381.

On the basis of our field observations we conclude that an individual located on the plume centerline and at the distance of maximum ground level activity throughout the entire venting received a krypton-85 skin dose of approximately 6 millirems. Doses due to inhalation and direct exposure to other components of the plume are apparently negligible. However, the long term health effects of particulate radionuclides released to the surrounding farmlands are much more serious.

Using Met Ed's post-venting estimate of 43,000 curies of krypton-85 released and our measured ratio of strontium-90 to krypton-85 activity, we calculate a total of 7 millicuries of strontium-90 released. A reasonable estimate of cesium-137 released is approximately 20 millicuries. This estimate is consistent with our strontium, gamma emission and gross beta measurements and with the higher volatility of cesium. We further estimate about 1.5 millicuries of strontium-89 was also released. We calculate here only the effect of strontium-90, the most important isotope.

About 40% of the land in the TMI area is cropland including pastureland for milk cows. We assumed therefore that 40% of the released isotopes are deposited on crops or pasture, and of this amount, 1% is ingested by humans each year. Allowing for the radioactive decay, the result is a total of 1.1 millicures of strontium-90 eventually ingested by humans, resulting in a population dose of 2000 person-rems to the whole body from the ingested strontium-90.[7] Using a doubling dose of 10 rems for adults for all forms of cancer derived from the results

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[7] Bunch, D.F., "Dose to various body organs from inhalation or ingestion of soluble radionuclides," in N.V. Steere, ed., Handbook of Laboratory Safety, Second Edition, Chemical Rubber Co., 1971, *and* U.S. NRC Regulatory Guide 1.109, "Calculation of Annual Doses to Man From Routine Releases of Reactor Effluents for the Purpose of Evaluating Compliance with 10 CFR Part 50, Appendix I," Revision 1, October 1977.

of the Tri-State Survey,[8] we find 200 doubling doses delivered to the population. In a population with a fatal cancer rate of 28%,[9] this much radiation will yield 56 additional cancer deaths. Children, infants and the unborn are much more vulnerable to the effects of radiation. Studies by Steward[10] on the carcinogenic effect of x-rays indicate a doubling dose for the unborn of approximately 1 rem. Thus, the additional risk of cancer or other radiation-induced effect is ten times greater in the young and unborn. Therefore, as many as 560 or more additional cancer deaths could result from this release of strontium-90 if the contaminated food was consumed principally by infants and pregnant women.

AREA's results show that a significant amount of strontium-90 was released to the environment from TMI during the June 28-July 11 venting period. Significant releases of strontium-89 and cesium-137 must also be inferred. As AREA wished to know the ratio of strontium-90 to krypton-85 in the TMI releases, and to measure specifically the amount of strontium-90 in those releases, we drew air samples from the plume centerline and at a distance of maximum ground level activity wherever possible. In this way, the background strontium-90 from global fallout was only a small fraction (less than .05 picocuries) of the reactor effluent strontium-90. Therefore, the background strontium-90 did not limit the sensitivity of our measurement, and we were able to measure the strontium-90 activity to krypton-85

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[8] Bross, I.D.J., Ball, M., Falen, S.: "A dosage response curve for the one rad range: adult risks from diagnostic radiation." American Journal of Public Health *69*, 130-136, 1979.

[9] The cancer mortality rate of 28 per cent is calculated from the 625,000 cancer deaths expected in a population of 2.2 million people referred to in NUREG-0683, section 6.1.5.2.

[10] Bithell, J.F., Stewart, A.M.: "Prenatal irradiation and childhood malignancy: a review of British data from the Oxford survey." British Journal of Cancer *31*, 271-287, 1975.

activity ratio in the reactor effluent to be 1.6 parts in 10 million.

The United States Environmental Protection Agency (USEPA), using their fixed air samplers, relied on chance to blow the narrow plume their way. This design also increased the volume of air ratio to the reactor effluent strontium-90, and also resulted in significant and variable amounts of background strontium-90 from fallout.[8] This background deposit substantially reduced the sensitivity of their measurement of the crucial strontium-90 to krypton-85 activity ratio. The significant and remarkable quantity of strontium-90, released to this agricultural region and measured by AREA, was not reported by the USEPA.

In summary, AREA's findings showed toxic radionuclides including significant amounts of strontium-90 were released in the two week venting period (June 28-July 11) of the containment building of the damaged TMI Unit 2 reactor in quantities that are 4 million times greater than the published predictions of Met Ed that were accepted by the NRC at the time. The airborne toxic radionuclides patterned themselves in a pie shaped wedge called a plume, with the highest readings seen downwind of the reactor and at a distance of maximum ground level activity. The long term health effects of strontium-90 released as particulates onto the farmlands were calculated to yield 56 additional fatal cases of cancer to adult humans eventually ingesting food from this area. Future generations ingesting crops from this area, because they will be children, are more vulnerable to the effects of radiation. Thus, AREA calculates 50 to 300 additional fatal cancers and other genetic health effects will appear in the next five to ten generations. No reports of deposits of strontium-90 or other particulate radionuclides have been made by Met Ed or the USEPA to date.

FIGURE 1

Measured Ground Level Activity at TMI
During Venting of Unit 2 Containment
June 28 to July 11, 1980

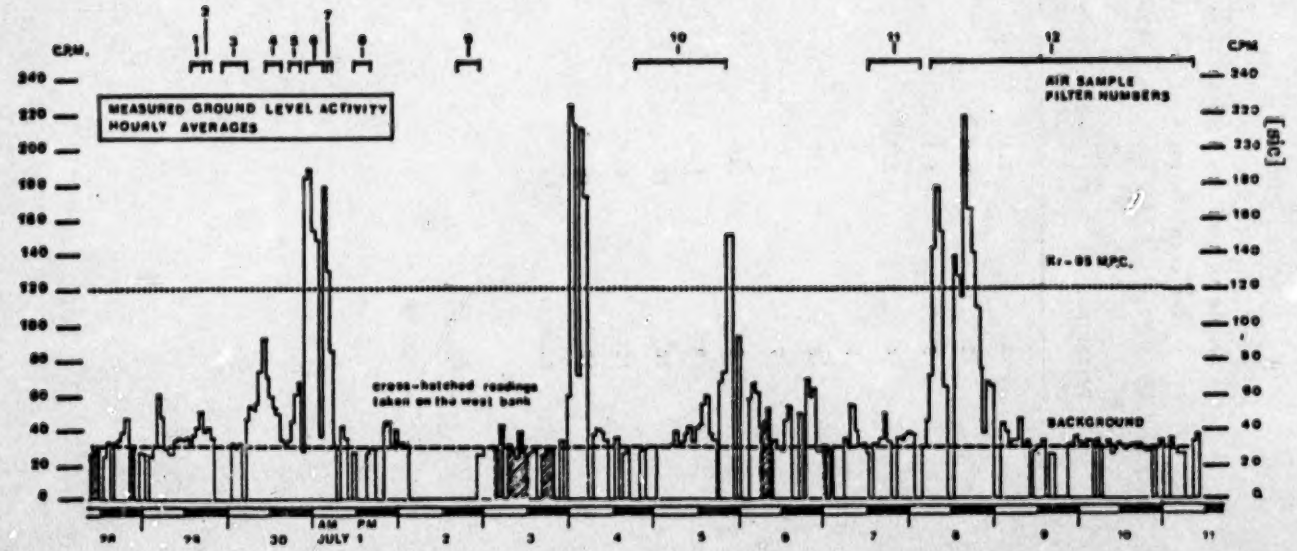

TABLE 3

Sample volumes and krypton-85 activity
for each air particulate sample

Filter No.	Volume Filtered (cubic meters)	Krypton-85 Filtered (nanocuries)
1	2.1	97
2	0.9	16
3	4.3	nd*
4	2.7	180
5	1.9	130
6	3.2	830
7	14	290
8	1.6	nd
9	4.2	710
10	12	1,700
11	5.0	50
12	16	2,900
TOTAL:	51	6,300

*no data

TABLE II

Results from combined filters*

Gamma-ray emission Ge(Li) Spectroscopy**	Total activity (picocuries)
beryllium-7	LT 30
potassium-40	LT 60
manganese-54	LT 2
cobalt-58	LT 2
cobalt-60	LT 3
zirconium-95	LT 3
ruthenium-103	LT 20
iodine-131	LT 6
cesium-134	LT 3
cesium-137	LT 3
barium-140	LT 4
cerium-141	LT 4
cerium-144	LT 20
radium-226	LT 50
thorium-228	LT 5
Radiochemical analysis**	
strontium-89	LT 2
strontium-90	0.95 $\pm$ 0.36

*Total filtered volume of 51 cubic meters containing 6.3 microcuries Krypton-85. LT = less than.

**Measurements performed by Teledyne Isotope, Westwood, New Jersey.

TABLE III

Reactor building air sample results (Met Ed)

Nuclide	Half-Life	Concentration (Curies per cubic meter)
Hydrogen - 3	12.26y	$5\pm1 \times 10^{-5}$
Carbon - 14	5730y	$4\pm1 \times 10^{-7}$
Iron - 55	2.6y	$< 6 \times 10^{-11}$
Cobalt - 58	71.3d	$< 1 \times 10^{-11}$
Cobalt - 66	5.26y	$< 1 \times 10^{-11}$
Kryton - 85	10.76y	$0.93\pm.07$
Strontium - 89	52d	$1.1\pm.5 \times 10^{-10}$
Strontium - 90	28.1y	$2.2\pm.2 \times 10^{-10}$
Ruthenium - 103	39.6d	$< 2 \times 10^{-9}$
Ruthenium - 106	367d	$< 2 \times 10^{-10}$
Silver - 110m	253d	$< 2.5 \times 10^{-11}$
Iodine - 129	1.7×10^{7}y	$6\pm2 \times 10^{-11}$
Cesium - 134	2.05y	$1.7\pm.1 \times 10^{-10}$
Cesium - 137	30.23y	$9.3\pm.3 \times 10^{-10}$
Uranium - 235	7.1×10^{8}y	$< 5 \times 10^{-12}$
Uranium - 238	4.51×10^{9}y	$< 2 \times 10^{-11}$
Plutonium - 238	86y	$< 2 \times 10^{-12}$
Plutonium - 239,240	24,400y & 6580y	$< 2 \times 10^{-12}$

All nuclide concentrations listed with a less than symbol indicate that those nulcides are below the listed instrumentation sensitivity for those nuclides.

Note: Sample taken April 1980 through containment penetration R-626. Approximate inventories can be calculated by multiplying the concentration by the free volume of the containment building, 5×10^{4} cubic meters.

SUPREME COURT OF THE UNITED STATES

No. 80-1640

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., PETITIONERS

v.

STEVEN SHOLLY, ET AL.

ORDER ALLOWING CERTIORARI
Filed May 26, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with 80-1656—*Metropolitan Edison Company, et al.*, Petitioners v. *People Against Nuclear Energy, et al.*, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 80-1656

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ORDER ALLOWING CERTIORARI
Filed May 26, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with 80-1640—*United States Nuclear Regulatory Commission, et al.*, Petitioners v. *Steven Sholly, et al.*, and a total of one hour is alloted for oral argument.

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Nos. 80-1640, 80-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY, *Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER, *Respondents.*

OPPOSITION TO THE PETITIONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred when it ruled, below, that sentence four of the 1962 amendment to §189(a) of the Atomic Energy Act gave no authority to the petitioning Nuclear Regulatory Commissioners to deny the Respondents the public hearing which Respondents had formally requested *before* the Commissioners finalized an amendment to the operating license of the Three Mile Island Nuclear Reactor and allowed the licensee to complete action pursuant to said amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1640, 80-1656

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY AND
PENNSYLVANIA ELECTRIC COMPANY, *Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER, *Respondents.*

OPPOSITION TO THE PETITIONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

People Against Nuclear Power, Steven Sholly and Donald E. Hossler ("Respondents") hereby oppose the Petition For The Issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cause of action.[1]

[1] Petitioners in the Court of Appeals, (Respondents in this Court) were People Against Nuclear Energy, Steven Sholly and Donald E. Hossler. Respondents in the Court of Appeals, (Petitioners in this Court,) were the five Commissioners of the Nuclear Regulatory Commission: Joseph M. Hendrie, John Aherne, Victor Gilinsky, Richard T. Kennedy and Peter A. Bradford; the Nuclear Regulatory

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit from which appeal is sought before this Court is not yet published. A copy of this opinion is, however, included in the Petition for Certiorari submitted to the Court by the Nuclear Regulatory Commission in Appendix A, pp. 1a-27a.

The Court of Appeals Order denying the Petitioners' suggestion for a rehearing *en banc*, and the Statement on Denial of Rehearing *En Banc* by some members of the Court below is also unpublished. Copies of these filings are also included in the Petition for Certiorari filed by the Nuclear Regulatory Commission in Appendix B, at pp. 28a-29a and pp. 30a-46a respectively.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 19, 1980. A Petition for Rehearing and a Suggestion for a Rehearing *En Banc* were denied on March 4, 1981. The jurisdiction of the Supreme Court is invoked by the Petitioners under 28 U.S.C. 1254(1).

Commission; the United States and the Intervenor-Respondents-Licensees below Metropolitan Edison Co., Jersey Central Power & Light Company and Pennsylvania Electric Company. The Respondents have used the caption for this case selected by the Petitioning NRC, though the individual Commissioners should also be included in the caption.

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. §2239(a), provides, in pertinent part, as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit *** the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application ***[T]he Commission may, in the absence of a request therefore by any person whose interest may be affected, issue *** an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for *** an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT OF THE CASE

This case constitutes an effort on the part of the five Commissioners of the United States Nuclear Regulatory Commission and the Licensees of the now infamous Three Mile Island Nuclear Reactor in Harrisburg, Pennsylvania to overturn a unanimous ruling by a three judge panel of the United States Court of Appeals for the District of Columbia Circuit[2] declaring that the Nuclear Regulatory Commissioners are required by law to afford to

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[2] This panel was comprised of Chief Judge J. Skelly Wright, Judge Abner Mikva and Judge Harry T. Edwards.

any person whose interest may be affected by a proposed amendment to an operating license of a nuclear reactor a public hearing — once such a public hearing has been formally requested by such person — and that this public hearing must be held *prior to* the Commissioners' rendering such a proposed amendment final by allowing the Licensee to undertake action pursuant to such amendment.

The Respondents before the Court in this case agree with the Circuit Court below and argue to this Court that "persons whose interests may be affected by" such a proposed amendment or modification of the operating license of a nuclear reactor have a legal right to a public hearing *before* such an Order can lawfully be finalized by the Commissioners — if such persons formally contest such an amendment and demand such a public hearing before the licensee undertakes action pursuant to such proposed amendment. The Circuit Court below ruled that the right to such a demanded prior public hearing is specifically recognized in §189(a) of the Atomic Energy Act of 1954.[3]

The Nuclear Regulatory Commissioners, and the Licensees of the Three Mile Island Nuclear Reactor, argued below, and they reargue again before this Court, that the 87th Congress expressly *took away* this right to a demanded prior public hearing on proposed nuclear operating license amendments in 1962, when the Congress

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[3] The Respondents before this Court maintain that they also have a *constitutional* right to such prior notice and a prior public hearing before the NRC Commissioners can finalize an amendment to the operating license of a nuclear facility which (a) authorizes the venting of radioactive gas from a nuclear reactor directly into their neighborhoods, which venting is expressly forbidden under the operating license which is being amended by the proposed Order and

amended the Atomic Energy Act of 1954 to allow the Nuclear Regulatory Commission to waive the full 30-day notice and publication period before authorizing licensees to undertake action pursuant to a proposed license amendment which was *uncontested* by citizens if the NRC staff made a determination that said license amendment involved "no significant hazards consideration."

The Petitioners ground their repeated contention in two separate "legislative history interpretation" arguments. Both of these arguments are addressed by the Respondents below.

The Petitioners also raise two other arguments in support of their demand that the Supreme Court review, and reverse, the Circuit Court's ruling below. These are: (1) that the Circuit Court below did not give "due deference" to the allegedly clear and consistent historical interpretation given by the Nuclear Regulatory Commission to what the NRC charges is an inherently ambiguous Congressional statute and (2) that the functional impact of the Circuit Court's decision below will be to require full public hearings on all proposed amendments to nuclear plant operating licenses which the NRC staff declare to involve no significant hazards consideration — and that such hearings will constitute a "monumental disruption of the Commission's license review process" while yielding no added protection to the health and safety of the public.

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which, (b), amends the operating license to authorize the licensee to release radioactive gas from a nuclear reactor directly into their neighborhoods at a rate which had never been allowed under the facility's operating license. The Circuit Court below, while recognizing the existence of this potential constitutional right, did not pass upon this question in the decision below. (See NRC Petition, Court's Opinion, App. A pp. 16a-17a, Fn. 20).

The two arguments are also addressed by the Respondents below.

SUMMARY OF RESPONDENTS' ARGUMENTS AS TO WHY THE WRIT SHOULD BE DENIED

The Respondents argue before this Court, first, that the 87th Congress which passed the 1962 amendment to §189(a) of the Atomic Energy Act intended to authorize the NRC to render final a proposed amendment to an operating license of a nuclear reactor without holding a prior public hearing on such proposed amendment *only* in those instances when the proposed license amendment was *uncontested* by persons whose interests might be affected by such amendment.

Respondents argue, secondly, that "sentence four" of the 1962 amendment of the Atomic Energy Act was intended by the 87th Congress to authorize — upon a specific finding by the NRC staff that a proposed operating license amendment involved no significant hazards consideration — *only* the waiver of the *full 30-day* notice and publication period which was mandated in the 1954 Act to expire before the NRC could authorize the licensee to undertake activity pursuant to said license amendment — *in the absence of a request for a hearing.*

Respondents argue, thirdly, that the Circuit Court below accorded all the deference that was legally due to the NRC's historical interpretation of §189(a) in light of the lack of clarity of that historical interpretation and in light of the clarity of the wording and legislative intent of §189(a) insofar as the narrow issue before the Court was concerned.

Finally, the Respondents argue that the Petitioners grossly misrepresent, and thereby vastly inflate, the functional impact on the operations of the Nuclear Regu-

latory Commission of the decision of the Circuit Court below and that, therefore, the Petitioners' foreboding of regulatory paralysis, which they say will be imposed upon the NRC by the Court's decision, must be disregarded by the Court as a reason for reviewing, and reversing, the Circuit Court opinion below.

ARGUMENT I

THE 87TH CONGRESS WHICH AMENDED §189(a) OF THE ATOMIC ENERGY ACT IN 1962 INTENDED TO ELIMINATE PUBLIC HEARINGS PRIOR TO THE FINALIZATION OF PROPOSED AMENDMENTS TO OPERATING LICENSES OF NUCLEAR FACILITIES *ONLY* IN THOSE INSTANCES IN WHICH PROPOSED LICENSE AMENDMENTS WERE "UNCONTESTED" BY PERSONS WHOSE INTERESTS MIGHT BE AFFECTED BY SUCH AMENDMENTS

The United States Court of Appeals for the District of Columbia Circuit, in 1973, undertook a thorough historical analysis of the legislative history of the 1962 amendment to the Atomic Energy Act of 1954. This was done in preparation of its opinion rendered in *Brooks* v. *Atomic Energy Commission,* 476 F.2d 924 (D.C. Cir. 1973). Because the Court had "previously rejected *the very construction* of §189(a) offered by the NRC and the licensee" in the case below in its final opinion in *Brooks,* the Circuit Court ruled below, that the doctrine of *stare decisis* compelled it to rule, in this case, that the NRC Commissioners had acted illegally when they refused to provide the Respondents in this case with their demanded public hearing. (Circuit Court opinion, NRC Petition, App. A, pp. 15a-16a).

There the Circuit Court stated:

> This is not the first case in this circuit in which it has been argued that a finding of "no significant hazards consideration" permits the NRC to issue a license amendment without a hearing. In *Brooks* v. *Atomic*

> *Energy Commission*, 476 F.2d 924, 926 (D.C. Cir. 1973) (per curiam), this court soundly rejected the contention that the fourth sentence in §189(a) "indicated Congressional intent to dispense with hearings in construction permit amendment proceedings . . ." when the Commission determines that the amendment involves "no significant hazards consideration." Instead, this court, after an examination of the legislative history of §189(a), held that the fourth sentence only dispenses with requirements of notice and publication. (Id., p. 15a)

The Circuit Court went on, in the case below, to undertake, for the Petitioners here, a *re*-review of that legislative history of §189(a), at pp. 16a-22a of its opinion, and ruled, more specifically, that the legislative history of §189(a) made it abundantly clear that the 1962 amendments to §189(a)

> had their origin in Congressional concern over a hearing requirement in *uncontested* cases — that is, when a hearing had not been requested. (Id., p. 17a)

In fact the Circuit Court below pointed out that the Petitioner, Metropolitan Edison Company *itself*, in 1961, had specifically testified before the Joint Committee on Atomic Energy of the 87th Congress and had explicitly acknowledged that the amendment to §189(a) that was being discussed expressly intended to retain a hearing requirement whenever a hearing was actually requested. Counsel for the Petitioner, Metropolitan Edison Company, stated, at that time, that:

> I hope that this committee will seriously consider repeal of the mandatory hearing requirement of §189(a), *leaving intact, of course, the provisions for a hearing at the request of any person whose interest may be affected by the licensing proceeding.* (citing) Radiation Safety and Regulation: Hearings Before the

> Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. 266 (1961) (testimony of George F. Trowbridge) (Id., pp. 17a-18a, Fn. 21) (emphasis added)

Metropolitan Edison, and, indeed, Mr. Trowbridge *himself*, now appear before this Court and, rather surprisingly, it would seem, insist that it has always been clearly understood by the Petitioners that the 87th Congress which passed the 1962 amendments to §189(a) of the Atomic Energy Act expressly intended to *strip* the public of their right to a public hearing prior to making such proposed license amendments final whenever the NRC staff internally decided that the proposed license amendment at issue involved no significant hazards consideration.

It is difficult, indeed, for the Respondents to improve significantly upon the review of the legislative history undertaken by the Circuit Court in its opinion below. For this reason, this full review is included herein, by reference, by the Respondents.

The NRC and the licensees of Three Mile Island protest, however, that the Circuit Court below ignored a solitary piece of legislative history relating to the amendment of §189(a) on which they base their entire "legislative history" argument to this Court. This piece the Petitioners set forth for this Court at page 12 of the NRC's Petition. This proffered legislative history is a single line of one statement contained in the Congressional Joint Committee Report on the 1962 bill which amended §189(a) of the Atomic Energy Act. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962) and H.R. Rep. No. 1966, 87th Cong., 2nd Sess. (1962), at page 8.

This single line of legislative history cited by the Petitioners makes oblique reference to certain "criteria" which were being applied, during 1962, by the Nuclear

Regulatory Commissioners under the terms of an AEC Regulation 50.59.[4]

The Petitioners point to this single piece of legislative history as allegedly dispositive evidence that the 87th Congress, in sentence four of its 1962 amendment, intended to authorize the NRC Commissioners *to refuse public hearings*, upon an internal NRC staff finding of "no significant hazards consideration" despite the fact that the clear language of sentence four of the amendment, upon such a finding, authorized *only* the waiver of the full *30-day* notice and publication period before allowing the licensee to undertake action pursuant to such an NRC-approved amendment — so long as that proposed amendment went uncontested and no public hearing had been requested. The very *waiver of this full 30-day waiting period* was what was set forth in AEC Reg. 50.59 referred to by the Congress.

The Petitioners demand that the Court draw an entirely *indirect* inference as to exactly what particular procedural "criterion" the 87th Congress was referring to by its oblique reference contained on page 8 of the Joint Committee Report when a *direct* examination of the precise procedures authorized by the Joint Committee are set forth on the face of that Report. These are as follow:

> Under this plan (set forth in §189(a), the issuance of . . . operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of a public hearing. *In the absence of a request for a hearing,* issuance of . . . an operating license, or an amendment to an operating license, would be possible without a formal proceeding, but on the public record. It will *also* be possible for the

[4] 10 C.F.R. 50.59, published on June 9, 1962 at 27 Fed. Reg. 5492-5493.

> Commission to dispense with the *30-day* notice requirement where the application presents "no significant hazards consideration." *This criterion* is presently being applied by the Commission under the terms of AEC Regulation 50.59. H.R. Rep. No. 1966, 87th Cong., 2nd Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2nd Sess. 8 (1962). (emphasis added)

A review of this statement of policy by the 87th Congress makes it clear that the Congress was saying that the NRC was being authorized, by the 1962 amendments to the 1954 Act, to allow licensees to undertake action on a proposed operating license amendment, as a final order, *in the absence of a request for a hearing* "without a formal proceeding" (i.e. without a prior public hearing) and *"also"* without the full 30-day notice requirement where the application presents no significant hazards consideration (as determined by an internal NRC staff finding). *This* is the "this criterion" to which the Joint Committee was referring in the sentence so heavily relied upon by the Petitioners.

In short, this argument of the Petitioners does *not* outweigh the vast quantities of legislative history directly to the contrary of their contention marshalled by the Court below to support its judgment that the 87th Congress did *not* intend, by its language set forth in "sentence four" of the 1962 amendments to the Atomic Energy Act of 1954, to strip American citizens of their right to a prior public hearing on proposed amendments to the operating license of nuclear reactors — when those citizens were persons whose interests might be affected by such proposed amendments and they had formally demanded such a hearing prior to the time the licensee had begun to undertake action pursuant to the NRC's approval of the proposed amendment.

ARGUMENT II

SENTENCE FOUR OF THE 1962 AMENDMENTS TO THE ATOMIC ENERGY ACT OF 1954 WAS INTENDED BY CONGRESS TO AUTHORIZE, UPON A FINDING BY THE NRC STAFF THAT A PROPOSED LICENSE AMENDMENT INVOLVED "NO SIGNIFICANT HAZARDS CONSIDERATION," *ONLY* THE ELIMINATION OF THE FULL *30-DAY* NOTICE AND PUBLICATION PERIOD REQUIRED BY THE EARLIER ACT TO PRECEED ACTION BY THE LICENSEE PURSUANT TO THE PROPOSED AMENDMENT — "IN THE ABSENCE OF A REQUEST FOR A HEARING"

Argument I, set forth above, explicates the legislative history of the 1962 amendment to §189(a) of the Atomic Energy Act of 1954 which makes it clear that the 87th Congress which considered, and passed, these 1962 amendments intended to eliminate mandatory public hearings, prior to the NRC's finalization of a proposed amendment of operating licenses of nuclear facilities, *only* in those instances in which such proposed amendments were *uncontested* by persons whose interests might be affected by said proposed amendments.

This still left the Nuclear Regulatory Commission faced with a 1954 statutory requirement that it delay licensee action to be undertaken pursuant to a proposed operating license amendment for a full 30 day period — even in those instances when the proposed amendment *was* entirely uncontested by all persons whose interests might be affected by the proposed amendment.

For this reason, the 87th Congress expressly authorized the NRC to waive the full *30-day* notice and publication period in instances in which the NRC staff had made a determination that "no significant hazards consideration" were involved in the proposed operating license amendment — so long as no person whose interests might be affected by the proposed amendment had formally requested a hearing.

As was pointed out by the American Bar Association, during the 1962 Hearings into the proposed amendments to §189(a) of the Atomic Energy Act,

> 14 out of 15 of [the Atomic Energy Commission's] cases have been *uncontested.* (AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2nd Sess. 64 (1962) (Statement of Raoul Berger)

This meant that the elimination of the full 30-day notice and publication period mandated by the 1954 Act, in those cases which did not involve potential health and safety problems, would allow the NRC to proceed immediately to the implementing of proposed nuclear operating license amendments in *98%* of the proposed license amendment cases.

Surely, this was a significant, and beneficial, change from the 1954 Act which would almost entirely accommodate the NRC, which was, up to 1962, being forced by the express terms of the 1954 Act to delay licensee action on *all* proposed nuclear operating license amendments for a full 30 days — when only a tiny fraction of such proposed amendments (approximately 2%) *really* needed to await any prior hearing.

After the 1962 amendments of the Act of 1954 here under discussion, there were only two small categories of proposed nuclear operating license amendments whose implementation by the licensee would have to await a full 30-day notice period or be preceeded by a public hearing. These would be (a) *all* proposed nuclear operating license amendments which had been expressly challenged[5] (in

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[5] i.e. all those proposed license amendment cases with regard to which "persons whose interests might be affected by the proposed license amendment" *had* formally demanded a prior public hearing.

which hearings would have to be held) *and* all proposed nuclear operator license amendments with regard to which the NRC staff had *not* made a specific finding that said proposed license amendment involved "no significant hazards consideration" (implementation of which would have to await the expiration of the full 30-day notice and publication period.)

This is the entirely logical import, and explanation, of the 87th Congress' 1962 amendment to the Atomic Energy Act of 1954. The NRC, in the case before the Court, is simply faced with an infrequent example of a case in which its staff *has* made an internal decision to the effect that a given proposed operating license amendment involved "no significant hazards considerations" (thus, theoretically, authorizing the NRC to avoid the full 30-day notice and publication period) but in which interested citizens have *still* formally demanded a public hearing prior to the implementation of the NRC's proposed license amendment.

While this case may well be one of those rare cases which falls into one of the interstices of the Act not expressly discussed by the 1962 amendment of the Act, the Petitioners' argument that the 87th Congress somehow expressly intended to *take away* from citizens their right to such a demanded public hearing which right was expressly recognized to exist in the 1954 Act is totally unsupported by the Petitioners' distorted argument to the effect that "sentence four" of the 1962 amendment makes no sense if citizens are allowed their hearing upon demand, even if the NRC is not required to give them a full 30-day's notice. (NRC Petition, p. 13, Metropolitan Edison Petition, pp. 11-13.)

The Circuit Court's interpretation of Congress' 1962 amendment makes perfect sense and relieved the NRC

of the need to hold public hearings or to await the expiration of a full 30-day notice and publication period in almost 98% of the license amendment cases.

ARGUMENT III

THE CIRCUIT COURT OF APPEALS BELOW ACCORDED THE HISTORICAL INTERPRETATION GIVEN TO §189(a) OF THE ATOMIC ENERGY ACT BY THE NUCLEAR REGULATORY COMMISSION ADEQUATE LEGAL CONSIDERATION

Both the NRC and the licensee Intervenors argue that the Circuit Court below disregarded a perfectly clear administrative interpretation given to §189(a) by the NRC over a 20-year period and that the Circuit Court held §189(a) and its legislative history to be "unambiguous" — despite the Circuit Court's earlier observation that "the text and legislative history of the section are replete with ambiguities and inconsistencies." (e.g. Metropolitan Edison Petition, pp. 13-14, Fn. 14).

In fact, the Circuit Court below ruled that it was the "history of regulations and administrative practice by the AEC and the NRC" that were ambiguous[6] (*not* clear and consistent, as the Petitioners suggest) and the Circuit Court found that §189(a) and its legislative history were "unambiguous" *insofar as* the statute's provision was concerned which provided that a finding of no significant hazards consideration was *not* intended to permit the NRC to dispense with a demanded public hearing. (NRC Petition, App. A, p. 20(a), Fn. 24)

This set of facts presents this Court with a legal situation considerably different than that which the Petitioners suggest and the situation in which appellate

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[6] Circuit Court opinion, NRC Petition, App. A, p. 22(a), Fn. 26.

courts have disturbed judicial tribunals' efforts to interject their interpretation of an *ambiguous* statute in the stead of an administrative agency's *clear and consistent* interpretation of such a statute.

The Court of Appeals in this case was presented with an ambiguous and confusing administrative interpretation of §189(a) by the NRC and with a provision of §189(a) which was entirely clear with regard to the precise issue which was presented to the Court for decision. Therefore, the Court below was correct when it ruled that such "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing to construction. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933)" (Circuit Court Opinion, NRC Petition, App. A, p. 22(a), Fn. 26)

ARGUMENT IV

THE PRACTICAL IMPACT OF THE CIRCUIT COURT'S DECISION BELOW IS MISREPRESENTED, AND THEREBY VASTLY OVERSTATED, BY THE NRC AND DOES NOT AFFORD THE PETITIONERS ANY SUPPORT FOR THEIR DEMAND THAT THIS COURT REVIEW, AND REVERSE, THE CIRCUIT COURT'S DECISION BELOW

Both the NRC, at pp. 15-17 of its Petition, and the Licensee Intervenor, at pp. 14-16 of its Petition, argue that the Circuit Court's ruling below will "impose substantial and novel administrative burdens on the Commission,"[7] will "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both,"[8] will "have a dramatic impact on the administrative machinery for regulation of nuclear plants,"[9] and will pose a "monumental disruption of the

[7] NRC Petition, p. 15.

[8] Loc. Cit.

[9] Metropolitan Edison Petition, p. 14-15.

Commission's current license amendment review process."[10] In short, the Petitioners argue that the Supreme Court's refusal to set aside the Circuit Court's ruling below will "significantly undermine the public interest,"[11] by requiring the NRC to shut down numerous nuclear plants, while this entirely unnecessary hearing process runs its course.[12]

The short answer to this parade of fantasized horrors is given by the Respondents in the information set forth in Argument II above. This is that the Circuit Court's opinion below does *not* require the NRC to provide a "nine month" processing of each "no hazards" amendment application, as the NRC disingenuously complains at page 15 of its Petition. As Respondents pointed out in Argument II above, all available evidence demonstrates that *less than 2%* of the NRC's proposed nuclear operating license amendments are ever challenged. (See American Bar Association testimony before Congress cited above at p. 13). It is only such *challenged* proposed license amendments that would require public hearings before their implementation. And it is only those proposed license amendments that involve potential "significant hazards consideration" (no matter what the NRC staff might adversarily determine in this regard) that are likely to draw challenges. This is clearly exactly what the 87th Congress which "tuned" §189(a) in 1962 expected.

The Petitioners bizarrely argue that the Court's decision below somehow mandates a full public hearing

[10] Loc. Cit.

[11] Loc. Cit.

[12] Loc. Cit.

every time the NRC staff determines that a given proposed operating license amendment involves "no significant hazards consideration." Metropolitan Edison at page 14 of its Petition, points out that:

> [I]n the last four calendar years, the Commission has published in the *Federal Register* notice of more than 1500 license amendments which fall into this category (those which are found by the NRC staff to present no significant hazards consideration).

Metropolitan Edison then goes on to suggest that the Circuit Court's interpretation of §189(a) below

> . . . might necessitate Commission hearings on such a large scale [and] would have a dramatic impact on the administrative machinery for regulation of nuclear plants.

This entirely disingenuous level of argument is only too characteristic of the performance of the licensee and the NRC in this case.

For it is clear that the Circuit Court's ruling below necessitates no such thing. Its ruling requires a public hearing only when such a hearing is formally demanded by citizens whose interests might be affected by proposed nuclear facility operating licenses — exactly as the 87th Congress intended.

The Circuit Court's ruling below does *not* require such a public hearing every time the NRC staff internally determines that a proposed operating license amendment involves "no significant hazards consideration," as the Petitioners suggest.

In short, an analysis of the Circuit Court's ruling characterized by any integrity at all totally belies the Petitioners' prognostications of administrative paralysis and plant closings. Such arguments constitute no credible

support for the Petitioners' demand that this Court review, and reverse, the Circuit Court's decision below in this case.

CONCLUSION

This Supreme Court should reject all four of the Petitioners' arguments made in support of their demand that this Court review, and reverse, the decision below of the Circuit Court. Their Petition should be denied.

DATED: May 5, 1981

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1980

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Nuclear Regulatory Commission is compelled by Section 189(a) of the Atomic Energy Act, as amended, 42 U.S.C. § 2239(a), to conduct a prior hearing on a nuclear power plant license amendment upon request by an interested party, even though the amendment is found by the NRC to raise "no significant hazards consideration."

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No. 80-1640
No. 80-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA,
Petitioners,

v.

STEVEN SHOLLY, *et al.*,
Respondents.

METROPOLITAN EDISON CO., *et al.*,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitions for a writ of certiorari filed by the United States Nuclear Regulatory Commission ("NRC") and the United States of America on March 30, 1981 ("Government Petition") and by the Metropolitan Edison Company,

Jersey Central Power & Light Company and Pennsylvania Electric Company on April 2, 1981 ("Utility Petition") in this case.[1] Petitioners seek the United States Supreme Court's ("the Court") review of a holding by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that the NRC must hold a prior hearing on any nuclear power plant operating license amendment upon the request of an interested party even though the amendment has been determined by NRC to involve no significant hazards consideration. *Sholly* v. *Nuclear Regulatory Commission*, ___F.2d___(D.C. Cir. 1980), Utility Pet., App. C.

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent of the nation's electricity users. This case concerns matters of considerable importance to customers of its member companies and its members themselves who now or may in the future hold construction permits[2] or operating licenses for nuclear power plants.

The decision by the Court of Appeals has an impact that extends far beyond this particular case. This decision imposes substantial new administrative burdens upon the NRC. In effect, it requires the NRC to hold hearings prior to acting on amendments to construction permits or operating licenses, even when the NRC determines the amendments present no significant hazards consideration. By seeming to equate a request for a hearing with a mere expression of interest in the construction or operation of a nuclear power plant by a member of the public,[3] the decision will cause NRC considerable uncertainty when deciding whether a prior hearing must be held.

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[1] EEI has obtained the written consent of all parties to this case. The written consents have been filed with the Clerk of this Court.

[2] Although the *Sholly* decision arose in the factual context of an amendment to an operating license, the applicable statutory language on which the holding is based applies to amendments to construction permits as well as amendments to operating licenses. 42 U.S.C. §2239(a).

[3] Utility Pet., App. C at 39a, n.25.

These administrative burdens are likely to cause substantial delays in new nuclear plant construction and prolonged shutdowns of operations or periods of reduced power production at operating plants. This will in turn require the purchase of power to provide the energy not supplied by the nuclear plants. This will inevitably result in increased expense to the utilities and their customers due to the costs of purchasing replacement power and in increased use of imported oil in many cases to generate the replacement power. Neither of these adverse results is justified by public health and safety considerations.

In 1980 nuclear power plants produced 11 percent of the domestic electricity generated from all fuel sources by generating 251,122 million net kilowatt hours of electricity.[4] In 1979, the latest year for which figures are available, EEI member companies produced 83.7 percent, or 213,132 million net kilowatt hours, of the total nuclear power generated.[5]

EEI's members include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the NRC or for which applications for construction permits covering 11 units are now under review at the NRC.[6] As of December 31, 1979, 40,917,550 customers in 34 states were within the service areas of these EEI member utilities having operating nuclear plants and received direct benefits from the electricity they produced.[7] Customers in other states received benefits from these plants as well under regional interconnection agreements which, through regional transmission line grid systems, provide for the sharing of electricity among participating utilities.

Approximately 30,000 barrels of oil per day are needed to generate the electricity produced by a 1000 MWe nuclear plant. If, as the result of the *Sholly* decision, a nuclear power plant were shut down due to a prior hearing on a no significant hazards consideration operating license amendment, replace-

[4] U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* 70 (March 1981).

[5] U.S. Nuclear Regulatory Commission, *Operating Units Status Report, NUREG-0020*, Vol. 4, No. 1 (January 1980).

[6] U.S. Nuclear Regulatory Commission, *Owners of Nuclear Power Plants, NUREG-0327*, Rev. 2 (December 1979).

[7] Edison Electric Institute, *Catalogue of Investor-Owned Electric Utility Companies Operating in the United States*, 20th Ed. (1981).

ment power would be generated in some parts of the country by burning imported oil. The amount of imported oil needed would depend on the size of the nuclear power plant and the length of time replacement power was required.

Because the holding below will increase the time and expense involved in obtaining amendments to construction permits or operating licenses, all 87 of these EEI members are impacted by and have an identifiable interest in review of this decision. If the decision below is not reviewed and reversed, customers of these companies will bear the additional expense incurred through rate increases to pay for replacement power. The public interest in reducing the nation's dependence on imported oil is at stake in this case as well because of the imported oil that would be used to generate the replacement power in some parts of the country.

As a national association, EEI is in a position to present policy considerations, facts and legal arguments to this Court which demonstrate the national significance of the holding below. The Court's consideration of whether the holding below decides a question of federal law of sufficient importance to merit this Court's attention would benefit from this information. The balance of this brief *amicus curiae* demonstrates, from a national perspective, the impacts of the holding below and seeks to assist the Court to reach a determination that the public interest lies in granting the petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITIONS

In addition to the practical considerations set forth in this brief, substantial legal questions merit this Court's summary reversal or reversal following review on the merits of the holding below. The Court of Appeals failed to heed principles unanimously enunciated by this Court concerning judicial review of administrative procedures formulated by the agency in which Congress has conferred responsibility for substantive judgments. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). In doing so the Court of Appeals admitted that it had achieved a "paradoxical result" by holding that Congress authorized the Commission to dispense with prior notice of a license amendment, but required the Commission to hold a hearing upon request

before approving such an amendment. Utility Pet., App. C at 35a, n.20. This result would have been avoided if the Court of Appeals had deferred to twenty years of consistent NRC interpretation of its authority. The Court of Appeal's holding would then have reflected a sensible construction of the statute and its legislative history.

Four judges of the Court of Appeals for the District of Columbia Circuit who dissented from the denial of a suggestion for rehearing *en banc* of the panel decision in *Sholly* correctly concluded that "[u]nder the rubric of statutory interpretation, the panel has made a policy decision of major consequence.... We believe that the panel's inflexible blanket rule violates the Supreme Court's unanimous mandate in *Vermont Yankee* rejecting judicial imposition of administrative procedures upon an agency in excess of the statutory minima prescribed by Congress." *Sholly* v. *Nuclear Regulatory Commission*, Statement on Denial of Rehearing En Banc (D.C. Cir. March 4, 1981), Utility Pet., App. A at 3a. In *Vermont Yankee*, *supra*, 435 U.S. at 549, n.21, this Court recognized that a court should properly compel administrative agencies to comply with procedures mandated by relevant statutes, but advised that it should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. Rather, this Court stated that "[e]ven apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Id.* at 524.

We will show below that the panel decision erroneously applied the language of Section 189(a), misconstrued its legislative history, and dismissed twenty years of consistent agency interpretation in order to impose additional procedural requirements. This decision must be reviewed to rectify those errors and to restore the procedural format specified by Congress and adopted by the Commission.

If this Court declines to review the decision below, the NRC will be compelled to adopt additional administrative procedures governing review of applications for construction permits and license amendments in a manner that will prolong the

administrative process with essentially no incremental benefit to the public health and safety. Staff experts could be diverted from other regulatory actions acknowledged by all to have significant health and safety considerations. The entire nuclear power industry, its customers and the public generally will be impacted by such procedures. Before the NRC is compelled to do so, this Court should review the decision below to determine whether the Court of Appeals erred.

I. IN PRACTICAL TERMS THE DECISION BELOW WILL HAVE A PERVASIVE IMPACT ON ELECTRIC UTILITIES, THEIR CUSTOMERS AND THE NATIONAL INTEREST EXTENDING FAR BEYOND THE PRIVATE PARTIES IN THE CASE.

In order to appreciate fully the practical effect of the decision below, the legal question being addressed must be understood in the context of the overall regulatory structure Congress created in the Atomic Energy Act ("Act") to ensure the safe construction and operation of nuclear power plants. 42 U.S.C. §§2011 *et seq.* Congress has delegated this responsibility to the Nuclear Regulatory Commission. 42 U.S.C. §5841 (1980).

An electric utility cannot construct a nuclear power plant until the NRC has approved a construction permit. 42 U.S.C. §2235. During consideration of an application for a construction permit crucial issues concerning siting and public health and safety are addressed. Congress has recognized that the construction permit stage is "the critical point in reactor licensing . . . where the suitability of the site is to be judged." S. Rep. No. 1677, 87th Cong. 2nd Sess. 8 (1962). NRC is required to hold a public hearing on the application after thirty days notice and publication in the *Federal Register*. 42 U.S.C. §2239(a) (second sentence).

NRC is also required to prepare an environmental analysis in accordance with the National Environmental Policy Act ("NEPA"). 42 U.S.C. §§4321 *et seq.* The public may participate in the NEPA process through attendance at scoping meetings and the submission of written and often oral comments. 10 C.F.R. §§51.50-51.56.

In addition, the Advisory Committee on Reactor Safeguards ("ACRS") recognized by this Court as "a group of distinguished experts in the field of atomic energy," *Vermont Yankee, supra*, 435 U.S. at 526, independently evaluates all applications for construction permits and operating licenses. 42 U.S.C. §§2039, 2232(b). The ACRS report becomes a part of the public record of the utility's application. 10 C.F.R. §50.58.

Subsequent to the completion of construction, NRC must issue an operating license before the plant can commence full power operations. Interested members of the public may request a hearing before an operating license is approved. 42 U.S.C. §2239(a) (third sentence). If such a request is not made, the Commission may issue an operating license following thirty days notice and publication in the *Federal Register* of its intent to do so. *Id.* Thus, by the time an operating license is issued, the NRC will have held at least one hearing and may have held a second hearing addressing public health and safety issues relevant to operating the particular nuclear power plant.

The operating license is a complex document containing detailed terms, conditions and technical specifications which can run to hundreds of pages in a typical license. Utility Pet., App. F at 62a, Boyd Aff. para. 4. Because of their technical detail and scope, operating licenses and technical specifications frequently require modification. NRC regulations provide that any change to an operating license including technical specifications, no matter how small, requires an amendment to the operating license. 10 C.F.R. §50.59(a)(1)(c).

In the past four years NRC has approved more than 1600 operating license amendments which it determined raised no significant hazards consideration. Government Pet. at 15. Pursuant to 10 C.F.R. §50.58, the NRC has approved these 1600 amendments without prior public notice, as it did in approving the license amendment in this case. However, the NRC permits members of the public to request and obtain a hearing after approval of such license amendments. Government Pet. at 16.

In considering whether a license amendment involves no significant hazards consideration the NRC staff analyses a number of factors related to the safe operation of the nuclear

power plant. Utility Pet., App. F at 62a, Boyd Aff. para 5. Review of a few examples of operating license amendments falling into the no significant hazards consideration category provides a clearer picture of the types of amendments the NRC is called upon to address. These include an amendment to revise "the corporate (offsite) organization for support of the Trojan Nuclear Plant by placing all nuclear support activities in a single corporate division" (45 Fed. Reg. 74598, November 10, 1980), an amendment to modify "the Technical Specifications to reflect changes in the corporate structure of the Toledo Edison Company" (45 Fed. Reg. 48008, July 17, 1980), an amendment to revise "the Technical Specifications for this unit [Salem Nuclear Unit No. 1] to reflect changes in the organization that operates and supports the operation of both Unit Nos. 1 and 2 [and] consistent 'Administrative Controls' . . . also made to the Appendix B Technical Specifications" (46 Fed. Reg. 10578, February 3, 1981), and an amendment providing "a one time thirty-day extension for the visual inspection surveillance requirement for inaccessible snubbers"[8] (46 Fed. Reg. 19123, March 27, 1981).

Operating license amendments may also involve equipment changes for nuclear power plants. An example of such an operating license amendment which the staff in the exercise of its expert judgment determined constituted no significant hazards consideration is an amendment modifying "the Technical Specifications to reflect the replacement of power operated inboard containment isolation valve CV-4371-B with a manual stop check valve" (46 Fed. Reg. 19121, March 27, 1981).

Notwithstanding the NRC staff's expertise in such matters, under the holding of the Court of Appeals any one of these no significant hazards consideration amendments — whether involving questions of corporate staff reorganization or equipment replacement in operating plants — would have been the subject of a prior hearing upon the request of any interested party. A reasonable reading of the statute and its legislative history does not compel this result. Furthermore, under a conservative reading of *Sholly*, the Commission will be faced with the uncertainty of deciding whether to schedule a hearing before

[8] A snubber is a type of shock absorber used to protect plant piping from excess vibration.

approving even the most minor license amendments about which a member of the public had expressed an interest that could be considered in some way related to the amendment. To require a prior hearing has the effect of elevating amendments to operating licenses involving a no significant hazards consideration determination to the same procedural stature for hearing purposes as the issuance of the operating license itself or permit and license amendments recognized by all parties to raise significant safety issues. Such a result is unjustifiable under any reasonable and practical reading of Section 189(a).

If prior hearings were scheduled for such routine amendments, agency approval could be delayed for months. By one estimate, the expected delay in processing a no significant hazards consideration operating license amendment would be at least nine months. Utility Pet. at 15. Depending on the nature of the amendment, a lengthy hearing on an amendment determined to involve no significant hazards consideration could force an operating plant to shutdown, prolong the scheduled shutdown of a plant or force it to operate at reduced power for months.

In certain regions of the country nuclear power provides a significant proportion of the electricity generated from all sources. For example, in 1979 nuclear power in three regions of the country, the MidContinent Area Reliability Coordination Agreement[9] ("MARCA"), Northeast Power Coordinating Council[10] ("NPCC") and Mid-America Interpool Network[11] ("MAIN"), generated 26.1 percent, 24.0 percent and 20.8 percent respectively of the electricity produced from all fuel sources.[12]

Customers in these regions receive the benefit of electricity generated from nuclear power either directly as a customer of a utility having an interest in an operating nuclear power plant or indirectly through interconnection agreements. Particularly

[9] MARCA includes all or portions of the States of Wisconsin, Illinois, Michigan, Minnesota, Iowa, North Dakota, South Dakota, Nebraska and Montana.

[10] NPCC includes the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine.

[11] MAIN includes all or portions of the States of Missouri, Illinois, Wisconsin and Michigan.

[12] Edison Electric Institute, *1980 Annual Electric Power Survey* at 19.

in these regions, customers of electric utilities would feel the impact, through rate increases to pay for replacement power, of prolonged shutdowns or low power production resulting from hearings on operating license amendments determined by NRC to involve no significant hazards consideration.

In certain regions of the country, particularly NPCC, prolonged shutdowns would result in generation of replacement power through burning of imported oil. At 30,000 barrels per day of oil needed to generate the electricity produced by a 1000 MWe nuclear plant, the increased dependence on imported oil can become significant in a relatively short period of time.

The interests of these utility customers, the utilities themselves, and the national interest in reducing dependence on imported oil calls for review of the Court of Appeals decision to determine whether, in fact, the practical impact of the holding below is one that was intended by Congress and compelled by the language of Section 189(a).

II. THE COURT OF APPEALS ERRED BY ADOPTING AN INTERPRETATION OF SECTION 189(a) WHICH IS ILLOGICAL AND INCONSISTENT WITH THE ACT'S LEGISLATIVE HISTORY AND TWENTY YEARS OF CONSISTENT ADMINISTRATIVE PRACTICE.

A. The Court Of Appeals Decision Results In An Illogical Interpretation Of Section 189(a).

Statutes are to be construed in a manner which achieves sensible results. *United States* v. *Katz*, 271 U.S. 354, 357 (1925). Congress sensibly structured Section 189(a) to address the different types of regulatory actions involved in nuclear power plant permitting and licensing in relationship to the significance of those actions. Section 189(a) requires mandatory hearings prior to action on a construction permit application (42 U.S.C. § 2239(a) (first and second sentence)) which, as we have shown, Congress recognized as "the critical point in reactor licensing . . . where the suitability of the site is to be judged" (S. Rep. No. 1677, 87th Cong., 2nd Sess. 8 (1962)). Section 189(a) also requires notice and publication of operating license applications and amendments to construction permits and operating licenses, but provides that hearings need be

held prior to approval only if requested by an interested party. 42 U.S.C. § 2239(a) (third sentence). For insignificant regulatory actions, which involve no significant hazards consideration amendments to construction permits and operating licenses, Congress even dispensed with mandatory notice and publication. *Id.* (fourth sentence).

Given the traditional view of the relationship between the notice of a proposed action and a right to a hearing before the action is taken, *see, Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the most sensible interpretation of this statutory scheme is that the language of Section 189(a) authorizes NRC to dispense with both the prior hearing and notice requirements for no significant hazards consideration amendments. NRC has explicitly adopted this view. Given the balance to be struck between the practical considerations of administering the Act and the essential need to protect public health and safety, the Commission's interpretation of its authority represents a sensible and effective approach to administration of the Act.

Rather than acknowledging the practical interpretation given this provision by NRC, the Court of Appeals adopted an admittedly "paradoxical" construction of Section 189(a). It held that Congress authorized the Commission to dispense with prior notice of a license amendment, but still required the Commission to hold a hearing upon request before approving such an amendment. Utility Pet., App. C at 35a, n.20. The Court of Appeals further admitted that "as the NRC and the licensee note, it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice." *Id.* Although the Court of Appeals found that the third sentence of Section 189(a) "plainly demonstrates" that Congress deliberately intended to "disentangle" the requirement of notice about a license amendment from the right to request a hearing prior to implementation of such an amendment (Utility Pet., App. C. at 35a), its reasoning in this case is directly inconsistent with the clear language of that sentence and with its earlier analysis of Section 189(a) in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924 (D.C. Cir. 1973). There it stated: "[c]ertainly, logic compels the conclusion, as

Congress recognized, that one may not timely request a hearing if he lacks notice that the Commission is about to take action." *Id.* at 927. Thus, no reasonable justification exists for the Court of Appeal's rejection of the Commission's practical interpretation of the Act.

B. The 1962 Amendments To Section 189(a) Ratified Earlier Administrative Action Authorizing The Commission To Dispense With A Public Hearing Prior To Approval Of A License Amendment Which The Commission Determined Constituted No Significant Hazards Consideration.

In 1962 the Atomic Energy Commission, the predecessor of the NRC, adopted a final regulation authorizing changes in technical specifications without a prior hearing if the changes involved no significant hazards consideration and the Commission found with reasonable assurance that the health and safety of the public would not be endangered. 27 Fed. Reg. 5491, 5492 (June 9, 1962), codified at 10 C.F.R. § 50.59(e)(2). The preamble to the proposed rule noted that the Commission planned to delegate authority to the staff to determine whether a proposed change involved a significant hazards consideration. 27 Fed. Reg. at 5492. Where it did not, such change was authorized without a prior public hearing. *Id.* The Commission noted that "[t]he revisions for § § 50.36 and 50.59 are based upon the provisions incorporated in License No. DPR-1 pursuant to the Commission's Memorandum and Order dated November 2, 1960 (*in the matter of General Electric, Vallecitos Boiling Water Reactor*, Docket No. 50-18)." *Id.*

On August 29, 1962, Section 189(a) of the Atomic Energy Act of 1954, as originally enacted, was amended. The amendment added the balance of what is currently Section 189(a) following the first sentence. Pub. L. 87-615, 76 Stat. 409 (1962). At that time Congress was aware of the position taken by the Commission in the *Vallecitos* decision. The Congressional Joint Committee on Atomic Energy in a 1961 report had already recommended administrative codification of the *Vallecitos* rule. *See*, Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*,

Vol. I, 73, n. 4 (Comm. Print 1961). The Joint Committee Report on the 1962 amendments to the Atomic Energy Act expressly adopted the *Vallecitos* approach embodied in 10 C.F.R. § 50.59, stating, "this criteria is presently being applied by the Commission under the terms of AEC Regulation 50.59." S. Rep. No. 1677, 87th Cong., 2nd Sess. 8 (1962); H.R. Rep. No. 1966, 87th Cong., 2nd Sess. 8 (1962). By so doing, the Congress endorsed the Commission's codification of the entire *Vallecitos* rule in 1962.

This reading of the 1962 amendment to Section 189(a) is consistent with the desire of the Congress and the Atomic Energy Commission at that time to reduce some of the licensing burdens and increasing work load arising from an accelerating number of license applications in a manner consistent with maintaining the public safety. The choice was made to rely on the expertise of the Commission to determine when license amendments raise no threat of potential harm to the public health and safety and could be authorized without a prior hearing. In *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069, 1077 (D.C. Cir. 1974), the Court of Appeals recognized this fact, stating, "[o]f first importance in this respect is the primary purpose of the 1962 amendments, namely, to unburden the Commission by authorizing it to delegate decisional authority and removing the necessity of holding unnecessary and duplicative hearings." The Court of Appeals' current interpretation of Section 189(a) contravenes that purpose.

C. The Commission Has Consistently Interpreted The 1962 Amendment To Section 189(a) As Authorizing It To Approve License Amendments Which Involve No Significant Hazards Consideration Without Conducting A Prior Hearing.

Following the 1962 amendment to Section 189(a) the Commission consistently interpreted its authority to permit approval of operating license amendments without a prior hearing when it determined the amendments involved no significant hazards consideration. Immediately after the 1962 amendment was promulgated, the Commission reaffirmed its earlier codification of the *Vallecitos* rule. 27 Fed. Reg. 12184, 12186

(1962), codified at 10 C.F.R. § 50.58(b). The Court of Appeals has recognized that the Atomic Energy Act erected a "regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel* v. *Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968). As the agency with responsibility for interpreting and implementing the Act, the Commission's contemporaneous and consistent interpretation of Section 189(a) is entitled to considerable deference. *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). That deference should not be abandoned due to the particular factual context in which a case arises. Consistent with the deference due the Commission's construction is the fact that neither the initial codification of the *Vallecitos* rule prior to the 1962 amendment of Section 189(a) nor its subsequent reaffirmation shortly after adoption of that amendment was ever challenged in court as beyond the authority conferred upon the Commission by the Act.

Since the *Vallecitos* rule was codified, the NRC and its predecessor, the AEC, have approved thousands of amendments, 1600 in the last four years alone, determined to involve no significant hazards consideration. Government Pet., at 15. Essentially, the Commission has said, and Congress affirmed in the 1962 amendments, that it is unnecessary and unproductive to divert staff resources from significant safety issues for a prior hearing on an amendment if the staff has found that the amendment involves no significant hazards consideration. The Commission's consistent interpretation of its authority reflects a judicious balancing of safety and practical considerations in administering the nuclear power licensing program.

CONCLUSION

For all of the foregoing reasons, the petitions for a writ of certiorari should be granted and the decision below should be summarily reversed.

Respectfully submitted,

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UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE UNITED STATES NUCLEAR REGULATORY COMMISSION

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QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorizes the Nuclear Regulatory Commission to amend an operating license for a nuclear power plant without first holding a hearing, if one has been requested, where the Commission determines that the amendment presents no significant hazards consideration.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1640

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

No. 80-1656

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE UNITED STATES NUCLEAR REGULATORY COMMISSION

OPINION BELOW

The opinion of the court of appeals (80-1640 Pet. App. 1a-27a) and the Statement on Denial of Rehearing En Banc by dissenting members of the court (*id.* at 28a-46a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1980 (80-1640 Pet. App. 47a-48a). Timely

petitions for rehearing and a suggestion for rehearing en banc were denied on March 4, 1981 (*id.* at 28a-46a; 80-1656 Pet. App. 19a). The petition for a writ of certiorari in No. 80-1640 was filed on March 30, 1981. The petition for a writ of certiorari in No. 80-1656 was filed on April 2, 1981. The petitions were granted on May 26, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), provides in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT

This case arose on consolidated petitions for review of two orders of the Nuclear Regulatory Commission, issued

June 12, 1980, pertaining to measures to be taken as part of the cleanup effort in the aftermath of the March 28, 1979, accident at Unit 2 of the Three Mile Island nuclear power plant in Pennsylvania (TMI-2). Specifically, the Commission issued (1) a "Memorandum and Order" (80-1640 Pet. App. 49a-61a) authorizing release of pent-up radioactive krypton-85 gas from the reactor containment building into the surrounding atmosphere and (2) an "Order for Temporary Modification of License" (*id.* at 62a-67a) which amended the TMI-2 operating license by temporarily replacing the existing limits on releases of radioactive gases with new limits expressed in terms of actual radiation dosages measured off the TMI-2 site, designed to allow more rapid venting of the gas, while providing health protection equivalent to that afforded by the former limits (*id.* at 6a-7a & nn.7, 8).

1. Following the accident at the TMI-2 nuclear power plant, the Nuclear Regulatory Commission ("NRC") undertook a series of regulatory actions and environmental studies to guide and control the cleanup process (see 80-1640 Pet. App. 3a-8a). One of the primary subjects addressed was an accumulation of radioactive krypton-85 gas in the containment building surrounding the reactor which inhibited maintenance and cleanup operations (*id.* at 3a). In accordance with a Commission Statement of Policy, issued November 21, 1979 (J.A. 36-38), requiring prior environmental review and an opportunity for public comment on all proposals for treating the radioactive gases in the containment building, alternative strategies for overcoming this problem were reviewed in a draft environmental assessment circulated for public comment commencing on March 25, 1980. See 45 Fed. Reg. 20265 (1980). The draft assessment endorsed a proposal that the accumulated gas be released to the surrounding atmosphere in a program of controlled dispersion, based upon the conclusion that the contemplated release entailed no significant adverse

health or environmental impacts, and, unlike the available alternatives, could be carried out without undue delay.[1] After consideration of extensive written and oral comments on the draft assessment and the alternative courses of action reviewed therein submitted by members of the public, the Commission issued a final environmental assessment which concluded that controlled venting of the krypton-85 gas to the atmosphere was the best solution available.[2] The NRC adopted and implemented that conclusion by issuing the June 12, 1980 "Memorandum and Order" and "Order for Temporary Modification of License" (80-1640 Pet. App. 49a-67a).

Prior to and during the completion of pertinent environmental review, the Commission took steps necessary to preserve the status quo. For instance, the release of certain radioactive gases, including krypton-85, is a normal part of the operation of a nuclear power reactor. The operating licenses of all nuclear power plants, including TMI-2, make provision for such releases. In response to the March 1979 accident at TMI-2, however, the Commission suspended the licensee's authority to operate TMI-2 and required that the plant be shut down. 44 Fed. Reg. 45271 (1979). And on February 11, 1980, the Commission implemented its November 21, 1979, Statement of Policy mandating an opportunity for environmental review and responsive public comment by

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[1] While the venting alternative could be carried out in a matter of days, the NRC staff found that technically feasible alternatives would require approximately a year to complete (No. 80-1640 Pet. App. 56a).

[2] The Commission received some 800 written comments from the public regarding the draft assessment. The Commission also conducted more than a score of public meetings to provide information about the purging proposal and solicit the views of concerned individuals and organizations. State and local government agencies, as well as prestigious scientific organizations, availed themselves of the opportunity to be heard. Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere, NUREG-0662, May 1980, ch. 10; 80-1640 Pet. App. 50a.

expressly prohibiting purging of the accumulated krypton gas pending further order of the Commission. 45 Fed. Reg. 11282. The June 12 "Memorandum and Order" authorizing venting ("the venting order") provided the necessary approval based upon the intervening environmental review, and the Commission's conclusion that the purging operation could be implemented consistent with its statutory mandate to protect the health and safety of the public (80-1640 Pet. App. 57a-58a). Under the order, venting was not to begin for at least 10 days so as to allow anyone who wished to leave the vicinity an opportunity to do so (*id.* at 58a).

The "Order for Temporary Modification of License" also issued by the Commission on June 12, 1980, made a change in the technical specifications of the TMI-2 operating license altering the standards governing the permissible rate of release of the krypton gas.[3] The limits in the TMI-2 license prior to June 12, like those of other nuclear power plant operating licenses issued by the Commission, were stated in terms of "activities," *i.e.*, the aggregate number of atomic disintegrations per second in the materials discharged. Although the potential for off-site health effects is more directly related to radioactivity dosages than activity levels, such dosages are not ordinarily measured on a regular basis. They accordingly are not employed in license specifications. Instead, as stated above, licensing limits are set in terms of activity limits which can be readily and continuously monitored on site and which are calculated to

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[3] The Order for Temporary Modification of License did not in itself authorize any release of krypton, for that was already permitted under the TMI-2 license, subject to the suspension imposed on February 11, 1980, lifted by the June 12 "Memorandum and Order." On the other hand, the Memorandum and Order, unlike the Order for Temporary Modification of License, made no change in the rate of venting permitted.

ensure that off-site dosages remain at safe levels.[4] Following the TMI-2 accident, "an extensive environmental monitoring network * * * in the Three Mile Island area * * * capable of producing prompt and frequent off-site dose measurements" was established which made it feasible to set license release limits directly in terms of the radiation doses that might be caused by the krypton-85 releases during venting (80-1640 Pet. App. 64a). This substitution was made by the Commission in order to permit somewhat speedier purging of the containment building, based upon the findings that "the new limits will not be inimical to public health and safety" (*ibid.*).

No hearing specifically devoted to either of the orders issued on June 12 was held by the Commission prior to their issuance.[5] The Commission believed that no hearing was required as to the Memorandum and Order authorizing commencement of venting because, as is explained above, that order merely restored pre-existing license authority, originally granted after a hearing, that had been suspended, but not revoked, following the TMI-2 accident, and accordingly did not constitute an amendment to the TMI-2 operating license, subject to the hearing provisions of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). However, as its caption indicates, the other order affecting the TMI-2 cleanup issued by the Commission on June 12, the "Order for Temporary Modification of License," was treated as an amendment to the TMI-2 operating license by the Commission. Here, however, the Commission found that the recasting of the technical license specifications concerning release of radioactive gases in terms based directly on dosages measured off the plant site in place

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[4] The relationship between radiation released and off-site dosages depends upon weather conditions and assumptions about the pattern of distribution of released materials. Release limits are set so as to ensure that unacceptable doses will not occur off site in any location, whatever the weather conditions.

[5] But see note 2, *supra*, and accompanying text.

of the activity standard designed to achieve the same level of protection "involve[d] no significant hazards consideration" (80-1640 Pet. App. 65a). This finding, the Commission believed, made it unnecessary to grant a hearing prior to issuance of the license amendment. Accordingly, while noting that any interested person affected by the "Order for Temporary Modification of License" could request a hearing thereon pursuant to 10 C.F.R. 2.714 within thirty days, the Commission provided that the license amendment be effective immediately and that "[a] request for hearing will not stay the effectiveness of this order" (80-1640 Pet. App. 66a).

2. During the ten-day interval before the venting order took effect, respondents Sholly and People Against Nuclear Energy, along with one other group, requested, on June 16, that the Commission reconsider its June 12 orders, the finding of "no significant hazards consideration" respecting the change in the TMI-2 license release limits, and the decision to make the orders effective prior to an opportunity for a public hearing. On June 23, 1980, respondents Sholly and Hossler filed a petition for review of the two June 12 orders in the court of appeals. On June 26, 1980, the court of appeals denied an application for an emergency injunction to forestall commencement of venting (80-1640 Pet. App. 3a, 7a). That same day, the Commission, which had received the request for reconsideration on June 23 (J.A. 56) denied the request (*id.* at 55-60). The Commission noted errors in a study submitted to support the reconsideration request, and found that the request "presents no reason to alter the Commission's key determination that the proposed purging of the TMI-2 containment will have a negligible impact on physical health" (*id.* at 59).[6] On June 27 re-

[6] With regard to its "no significant hazards consideration" finding and petitioner's request for hearings prior to implementation of the license modification involved and the separate venting order, the Commission stated (J.A. 59-60; footnote omitted):

> [T]he Joint Motion criticized our finding that the temporary license modification involves "no significant hazards considera-

spondents lodged a request for a hearing on the two June 12 orders with the Commission. That request was referred to an Atomic Safety and Licensing Board ("ASLB") pursuant to 42 U.S.C. 2241 (80-1640 Pet. App. 7a). On June 28, venting actually began at the pace allowed by the TMI-2 license prior to the June 12 amendment. Only on July 8 did the licensee commence venting at the faster pace allowed by the amendment.

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tion" and therefore may be made immediately effective. We believe the joint petitioners have misunderstood the scope of this finding, which pertains only to the question whether changing the TMI-2 specifications from release limits to dose limits involves a significant hazards consideration. The dose limits aim at achieving the same level of protection of public health and safety and, in fact, do so more directly, since it is the associated dose rather than the radioactive releases themselves which are the focus of concern. Accordingly, the Commission reaffirms its determination that the temporary license modification involves no significant hazards consideration and may therefore be made effective immediately.

With regard to purging itself, the unmodified technical specifications which allow for purging were adopted as part of the licensing proceeding for TMI-2 after full opportunity for a public hearing. There has been extensive public participation in the purging decision through public meetings and comments on the environmental assessment. There has thus been ample opportunity for members of the public to raise any issue which might have been brought up in an adjudicatory hearing and to present evidence contradictory to the positions of the NRC staff or Metropolitan Edison. The joint petitioners complain that there has been no public hearing specifically devoted to purging, but they have not indicated that any relevant evidence exists which they have somehow been prevented from bringing to the Commission's attention. Accordingly, since the procedures by which the Commission's orders were developed met the requirements of the Atomic Energy Act and have provided for a thorough consideration of the issues, we reject the suggestion that these orders should be withdrawn on procedural grounds.

On July 3, respondents had moved the ASLB to suspend venting, but they withdrew that request on July 8. The purging process was completed on July 11, 1980. Off-site doses measured never reached the limits set in the June 12 license amendment (80-1640 Pet. App. 7a-8a).

3. Proceedings continued in the court of appeals.[7] The respondents there argued that: (1) the venting order improperly authorized venting of krypton to the atmosphere, (2) the Commission's decision that the license modification order entailed no significant safety questions was arbitrary, and (3) each of these orders had been issued without a prior hearing in violation of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). In response, the Commission and intervenors, TMI-2 licensees Metropolitan Edison Co., *et al.*, argued that: (1) the petitions for review had been mooted by completion of the venting process and the expiration of the June 12 orders, there being little likelihood of repetition of the need for extraordinary venting at TMI-2, (2) the venting order was reasonable, consistent with applicable Commission regulations, and was not an amendment to the TMI-2 operating license, and (3) the temporary license modification had properly been determined to involve "no significant hazards consideration," and was properly issued without offering or holding a prior hearing or giving prior notice of the action in the Federal Register, under the authority conferred by the last sentence of Section 189(a).[8]

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[7] A separate petition for review and an accompanying petition for a writ of mandamus were filed in the Third Circuit by respondent People Against Nuclear Energy on July 8, 1980, and were transferred to the D.C. Circuit and consolidated with the petition first filed there, by respondents Sholly and Hossler.

[8] The United States, separately joined and represented as a respondent in the court of appeals pursuant to 42 U.S.C. 2239(b), 28 U.S.C. 2342(4), 28 U.S.C. 2344, and 28 U.S.C. 2348, argued that the question whether Section 189(a) permits the NRC to dispense with a prior hearing where the Commission determines

Concluding that respondents' challenge to the Commission's authority to issue a license amendment found to entail "no significant hazards consideration" without allowing an opportunity for a prior hearing was not moot, the court of appeals reversed.[9] The court held that the final sentence of Section 189(a) of the Atomic Energy Act does not permit the Commission to dispense with a hearing prior to approval of a license amendment, even when the Commission determines that the amendment presents no significant hazards consideration. Rather, in the court's view, the provision in question authorizes only omission of some form of notice where a "no significant hazards consideration determination" is reached by the

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that a license amendment entails "no significant hazards consideration" was capable of repetition, but would not generally evade review, and that this case was therefore moot. In addition, the United States suggested that the petitioners' withdrawal of their request for suspension of purging rendered the case moot. However, the United States suggested that the last sentence of Section 189(a) does not permit the Commission to dispense with a hearing prior to approval of a license amendment if one is properly sought in a timely manner, notwithstanding a determination that "no significant hazards consideration" is presented by an amendment. The United States noted that there was some question whether a hearing had actually been requested in a timely manner here.

As is explained in the petition for certiorari (80-1640 Pet. 7 n.4), the United States has reconsidered its position and now joins the Nuclear Regulatory Commission in urging reversal of the judgment of the court of appeals.

[9] The court of appeals rejected the petitioners' contentions that this case was moot (80-1640 Pet. App. 8a-13a), concluding that the issue presented was "capable of repetition, yet evading review" (*id.* at 9a) and that the respondents' withdrawal of their request for a stay of venting (see page 9 & note 8, *supra*) did not prevent adjudication (80-1640 Pet. App. 26a n.28). The court of appeals also held, essentially *sua sponte* (but see note 8, *supra*), that the respondents' informal expressions of opposition to the venting plan constituted a timely request for a hearing prior to approval of any amendment to the TMI-2 license facilitating venting sufficient to trigger their statutory hearing rights under Section 189(a) (80-1640 Pet. App. 21a n.25).

Commission (80-1640 Pet. App. 13a-22a). Concluding, as well, that the June 12 venting order was a license amendment subject to Section 189(a) (*id.* at 23a-25a), the court declared that NRC had been required to hold a hearing prior to issuance of either the venting order or the temporary license modification order (*id.* at 26a).

In support of its interpretation of the concluding sentence of Section 189(a), the court of appeals relied upon language in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924, 927 (D.C. Cir. 1973), which the court regarded as settling the issue, while branding a contrary statement in *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974), unconsidered *dictum* (80-1640 Pet. App. 15a-16a & n.18). Alternatively, the court of appeals held (*id.* at 16a):

> The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence [of Section 189(a)] makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication.

The court of appeals also discerned support for its interpretation of Section 189(a) in passages from the legislative history of the 1962 amendments to the Atomic Energy Act that added the penultimate sentence of that provision, while contrary legislative history stressed by the Commission was discounted (80-1640 Pet. App. 17a-22a). Finally, the court rejected the suggestion that deference was due to the Commission's interpretation of the statute under which it operates, stating that the statutory text was irreconcilable with the Commission's position and accordingly did not allow room for such deference (*id.* at 21a-22a n.26).

The Commission and the intervenors petitioned the court of appeals for rehearing, with the intervenors suggesting en banc consideration. The petitions and suggestion were rejected on March 4, 1981 (80-1656 Pet.

App. 1a, 19a).[10] Four members of the court would have granted rehearing en banc. They filed a dissenting statement urging reconsideration of the panel's holding that the Commission may not dispense with an opportunity for a hearing prior to granting an amendment to a nuclear power plant operating license upon determining that the contemplated amendment entails no significant hazards consideration (80-1640 Pet. App. 30a & n.1). Likening the practice required by the panel decision to the kind of extra-statutory judicial "procedural imposition" condemned in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-548 (1978) (80-1640 Pet. App. 31a, 44a-46a), the dissenting judges concluded that the Commission's practice "complied fully with statutory mandates" (*id.* at 34a). The dissenters added that "the confusion inherent within" the legislative history of the 1962 amendments to Section 189(a) "concede[d by the panel] to be 'replete with ambiguities and inconsistencies'" was "alone sufficient reason why [that legislative history] should not have been cited selectively in support of the panel's sweeping rule" (*id.* at 38a, quoting 20a n.24).

SUMMARY OF ARGUMENT

In enacting the 1962 amendments to the Atomic Energy Act of 1954, Congress added language to Section 189(a) of the Act, 42 U.S.C. 2239(a), which governs hearings on applications for licenses under the Act. In pertinent part, the new provision is as follows:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a deter-

[10] The court of appeals stayed issuance of its mandate for a period of thirty days from the date of denial of rehearing pending filing of the Commission's petition for a writ of certiorari. Pursuant to Fed. R. App. P. 41(b), the effect of the court of appeals' decision remains in suspense until final disposition of this case by this Court.

> mination by the Commission that the amendment involves no significant hazards consideration.

This amendment was the culmination of a process of intensive congressional oversight and administrative innovation over a period of several years through which the Commission had developed procedures for handling of routine license amendments entailing no novel safety issues without requiring a public hearing prior to Commission action.

Shortly before Congress enacted the 1962 amendments, the Commission had promulgated regulations, 10 C.F.R. 50.59(e)(2) (1963) (27 Fed. Reg. 5493 (1962)), providing:

> If the Commission determines that the proposed change * * * does not present significant hazards considerations * * * it may authorize such change * * * without a prior public hearing * * *.

The legislative history of the 1962 amendments to the Atomic Energy Act demonstrates that by adding the language to Section 189(a) quoted above—the fourth sentence of that section—Congress intended to adopt the Commission's regulation. Indeed, the Report of the Joint Committee on Atomic Energy notes that the standard written into the statute "is presently being applied by the Commission under the terms of AEC Regulation 50.59" (S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962); H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962)). Thus, Congress expressly approved the Commission's assertion of authority to omit hearings prior to acting upon amendments which entail no significant hazards consideration.

The court of appeals erred in suggesting that the sole purpose of the 1962 amendment to Section 189(a) was to relieve the Commission of the obligation, imposed by earlier 1957 amendments to Section 189(a), to hold hearings—whether requested by interested parties or not—on issuance of operating licenses, and amendments to such licenses and to construction permits for nuclear power facilities. To be sure, Congress *did* relax the mandatory

hearing procedure. But that change was effectuated through amendment of the second sentence and the addition of the third sentence of Section 189(a). The addition of the *fourth* sentence of Section 189(a)—the critical provision for present purposes—had a discrete objective: to authorize the Commission to dispense with hearings on amendments involving "no significant hazards consideration."

The court of appeals incorrectly assumed that the result it reached is required by the "plain language" of Section 189(a). On the contrary, although the last sentence of Section 189(a) does not expressly mention hearings, read in context it does authorize the omission of notice and publication *of the Commission's intention to act without a hearing*. Under the circumstances, it is plain that Congress intended to allow the Commission to dispense with a hearing when routine amendments are considered. As the court below acknowledged, its decision creates a paradox; the court assumed that Section 189(a) allows the Commission to omit all public notice of routine amendments, but still requires that a hearing be held if someone somehow manages to learn of Commission proceedings in a timely fashion. Such an anomalous procedural rule should not lightly be ascribed to Congress.

Any ambiguity in Section 189(a) calls for deference to the Commission's long-standing interpretation of the statute under which it has operated from its inception. That is particularly appropriate here because of the evolution of the Commission's interpretation under close and regular congressional scrutiny. Special deference is also warranted because the court of appeals' interpretation of Section 189(a) carries the potential to frustrate the purposes of the Atomic Energy Act by thrusting novel and substantial administrative burdens onto the Commission, which could threaten the viability of the existing system of regulation of nuclear power production, the production of nuclear power itself, or both.

ARGUMENT

THE COMMISSION'S PROCEDURES POSTPONING ANY OPPORTUNITY FOR A HEARING UPON LICENSE AMENDMENTS FOUND TO ENTAIL NO SIGNIFICANT HAZARDS CONSIDERATION UNTIL AFTER INITIAL ACTION APPROVING THE AMENDMENT ARE CONSISTENT WITH THE REQUIREMENTS OF THE ATOMIC ENERGY ACT OF 1954

The court of appeals has, in this case, rejected a federal agency's long-standing reasonable and workable interpretation of a key provision of the statute under which it operates and disregarded the regulations which implement that interpretation. Yet Section 189(a) of the Atomic Energy Act, and the Commission's regulations and procedures thereunder, are the product of careful consideration by Congress: an evolutionary process entailing enactment of perfecting amendments on two separate occasions and continuous congressional oversight. Congress has ensured that the Commission's regulatory practice complies with the statutory mandate and has designed a system of regulation of the private nuclear power industry which is sufficiently detailed to ensure protection of public health and safety, and at the same time, sufficiently flexible to avoid proliferation of sterile and time-consuming proceedings which do not contribute to that overriding goal. The decision below upsets this vital balance and frustrates the expressed intentions of Congress. If permitted to stand, the court of appeals' decision could force a radical alteration in the Commission's regulatory practices, and may necessitate curtailment of nuclear power plant operations for reasons unrelated to any safety question concerning nuclear power.

1. An understanding of the procedural requirements of Section 189(a) pertaining to issuance of amendments to nuclear power plant operating licenses must begin with a review of the provisions of Section 189(a) as originally enacted, the amendments enacted in 1957 and

1962, the Commission's evolving practices and regulations thereunder, and the ongoing oversight process by the Joint Committee on Atomic Energy (JCAE). See 42 U.S.C. 2252; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408-409 (1961).[11]

a. In the Atomic Energy Act of 1954, Congress for the first time authorized private ownership and operation of nuclear reactors, providing, however, for regulation by the Atomic Energy Commission (AEC), predecessor to the present Nuclear Regulatory Commission. Actions by the Commission were subjected to the Administrative Procedure Act (see Section 181, 42 U.S.C. 2231),[12] and public notice and hearing requirements were provided for in Section 189(a) of the Act.[13] As originally enacted, Section 189(a), 42 U.S.C. (1952 ed., Supp. III) 2239(a), consisted of a single sentence providing, in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Thus, the Commission was not required to hold a hearing on an application to construct or operate a power reactor

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[11] Section 202 of the Atomic Energy Act of 1954, 42 U.S.C. 2252, which set out the authority and duties of the Joint Committee, was repealed by Section 1 of Pub. L. No. 95-110, 91 Stat. 884, in 1977, and the Committee itself was abolished. See 42 U.S.C. (Supp. III) 2258(a). The Commission was directed thenceforth to keep the committees of the House and Senate upon which oversight duties devolved "fully and currently informed with respect to * * * [its] activities." 42 U.S.C. (Supp. III) 2259(a).

[12] This provision remains in effect as 42 U.S.C. 2231.

[13] The process for licensing construction and operation of commercial nuclear power reactors is described in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525-527 (1978).

or any amendment to such a construction permit or operating license unless an interested party requested one. On the other hand, no special provision was made for handling of routine matters not involving health or safety issues.

A controversy concerning the Commission's practice under the 1954 version of Section 189(a) prompted amendments to the Act in 1957. In January 1956, the Power Reactor Development Company had applied to the Commission for a permit to construct a new kind of reactor near Lagoona Beach, Michigan. The Commission had issued a conditional construction permit without advance notice of its intent to do so, and without holding any prior public hearing, but allowed timely after-the-fact intervention by parties opposed to continuation of the conditional permit, and held hearings on their applications to revoke the permit.[14] The Commission ultimately upheld the construction permit against

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[14] At the time the AEC's rules of practice provided, 10 C.F.R. 2.102 (1956) (21 Fed. Reg. 805 (1956)):

> (a) The AEC will, upon request of the applicant or an intervenor, and may upon its own initiative, direct the holding of a formal hearing prior to taking action on the application. If no prior formal hearing has been held and no notice of proposed action has been served as provided in paragraph (b) of this section, AEC will direct the holding of a formal hearing upon receipt of a request therefor from the applicant or an intervenor within 30 days after the issuance of a license or other approval or a notice of denial.
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> (b) In such cases as it deems appropriate, AEC may cause to be served upon the applicant, and published, a notice of proposed action upon his application and shall cause copies thereof to be served upon intervenors or others entitled to or requesting notification. The notice shall state the terms of the proposed action. If a formal hearing has not been held prior to issuance of the notice, AEC will direct the holding of a formal hearing upon the request of the applicant or an intervenor received within fifteen days following the service of the notice.

The Commission acted under the second sentence of 10 C.F.R. 2.102(a) (1956) in the Power Reactor Development Company proceeding.

the challenges lodged by intervenors. Construction continued throughout the Commission proceedings. See *Power Reactor Co.* v. *Electricians*, *supra*, 367 U.S. at 399-403;[15] Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*, Vol. I, 27-28 (Comm. Print 1961).

There was sharp congressional criticism of the AEC's conduct in the *Power Reactor* case. Among other things, the Commission was faulted for failing to hold a public hearing on the construction permit in advance of issuance of the construction permit. See *Improving the AEC Regulatory Process*, *supra*, Vol. I at 30; Staff of the Joint Comm. on Atomic Energy, 85th Cong., 1st Sess., *A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities* 1, 8, 9, 110, 125-126, 197 (Comm. Print 1957).[16] In response to this criticism, the Commission modified its practices to ensure either that public hearings were held without waiting for a request, in advance of approval of reactor construction permits and operating licenses or any substantial amendments thereto, or that sufficient notice of the pendency of such licenses and amendments and the underlying issue was provided to the public to enable any interested party to request a hearing.[17] In September 1957, Con-

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[15] In *Power Reactor Co.* v. *Electricians*, which arose on petitions for review of the AEC's final order, this Court upheld the Commission's two-stage licensing procedure for nuclear power plants, under which a conclusive finding as to safety of the plant in operation was deferred to the point at which an application for an operating license is considered, rather than addressing this matter exhaustively at the time a construction permit is issued. No challenge to the postponement of the opportunity for a hearing until after the issuance of the conditional construction permit was raised by the parties or considered by the Court. 367 U.S. at 403.

[16] The primary object of congressional criticism, however, was the Commission's failure to release to the public a report by the Advisory Committee on Reactor Safeguards (ACRS) questioning the adequacy of the information available to the Commission to assess the safety of the proposed facility in operation.

[17] Letter from AEC Chairman Lewis L. Strauss to Senator Clinton P. Anderson, Chairman of the Joint Committee on Atomic

gress, acting on the recommendation of the Joint Committee on Atomic Energy, amended Section 189(a), *inter alia*, to prevent repetition of what had occurred in *Power Reactor Co.*, by adding the following sentence:

> The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application * * * [for a construction permit or operating license] for a facility * * *.

Atomic Energy Act Amendments of 1957, Pub. L. No. 85-256, Section 7, 71 Stat. 579. The language added made plain the Commission's obligation to hold public hearings, after appropriate notice, on applications for new construction permits and operating licenses, but did not address license amendments. Evidently uncertain as to the effect of the 1957 statutory amendments on procedures governing license amendments, especially those regarded as routine, the Commission began to hold hearings on such matters, whether or not requested by any intervening party. See *Improving the AEC Regulatory Process*, *supra*, Vol. I at 31-35.

b. As the Commission adopted more formal practices, including routine injection of formal public hearings at additional junctures in the regulatory process, it began to encounter criticism from Congress for overreacting to the 1957 amendments of the Atomic Energy Act. It was suggested that the AEC was unnecessarily holding hearings on license amendment applications where

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Energy (Jan. 4, 1957), reprinted in *A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities*, *supra*, at 110. Commission Chairman Strauss stated (*ibid.*; Committee's emphasis deleted):

> In order to insure that the public is adequately informed, the Commission has modified its practices with regard to processing applications for the issuance of construction permits and facility licenses on substantial modifications thereof. The Commission will in such cases either order a hearing to be held or issue a notice of intent to issue.

In other words, the Commission proposed to act under the first sentence of 10 C.F.R. 2.102(a) (1956) or under 10 C.F.R. 2.102(b) (1956) in such cases. See note 14, *supra*.

no intervenor had requested a hearing, as well as where no substantial safety question was involved. See *Improving the AEC Regulatory Process, supra*, Vol. I at vii, 31, 49-52, Vol. II at 580. This report, prepared by the staff of the Joint Committee on Atomic Energy as part of the oversight process (see 42 U.S.C. 2252), stated (*Improving the AEC Regulatory Process, supra*, Vol. I at 52):

> Experience with the licensing of facilities demonstrates that frequent alterations in a construction permit will often be necessary after the permit has been issued. The same thing is true of operating licenses for experimental and test reactors and, to a less degree, of operating licenses for power reactors. An advancing art will usually require that changes be made in the technical specifications of a reactor as its construction progresses and as operating experience accumulates. Since these technical specifications must be incorporated in the reactor license, minor changes in them constitute, in a formal sense, amendment to the license. This has led to burdensome proceedings as exemplified in the *Vallecitos* and *Yankee* cases. The Commission has mitigated the problem by allowing technical specifications to be rewritten so as to eliminate some matters of detail, but this process could be carried to a point where the protective value of having the specifications in the license would be largely lost. Clearly there is need for some more discriminating way to differentiate between those changes which require the same review as the initial permit or operating license would entail, and those which do not raise sufficiently significant issues of safety to justify such time-consuming proceedings.

Stressing the Commission's "[o]verdependence on formal hearings" (*id.* at 49), the Committee staff noted that the:

> merits of the formal hearing rapidly encounter the law of diminishing returns as successive hearings are held to pass either on proposed amendments to the construction permit or on the operating

> license. Only occasionally will the matter at issue justify the time-consuming, expensive business of preparing testimony and finding an opportunity to fit its presentation into the schedule of a busy hearing examiner. When no substantial safety question is involved in the conversion of a construction permit to an operating license or the amendment of either in some particular, the public interest would be protected by the filing of the proposed action in the Public Document Room, the publication of an apt notice in the Federal Register and the giving of an opportunity to any interested party to intervene with respect to any new matter raised by the action.

Id. at 49-50.[18]

By the time the Joint Committee's 1961 staff report was released, however, the Commission had begun to evolve procedures to deal more expeditiously with routine license amendments. In *General Electric Co.* (*Vallecitos Boiling Water Reactor*), 1 A.E.C. 541 (1960), the Commission issued an amendment to an operating license for a nuclear facility which specified that the Director of the

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[18] In the letter of transmittal covering this report, James T. Ramey, Executive Director of the Joint Committee noted (*id.* at viii):

> With respect to the hearings themselves, the Commission with some justice can point out that it was the Joint Committee and the Congress which instituted the mandatory hearing procedure. However, as this report indicates, the Commission has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures. The intent of the 1957 staff report was that AEC safety proceedings should be public and on the record. It would appear that the Commission has utilized the hearing process to extend the Commission's affirmative control over licensing to include startup operations and changes. While such control may be desirable, it might be accomplished without unnecessary hearings, but on the public record, with a later opportunity for hearing in the event of exceptions filed by any party or intervention.

The staff report also suggested (*id.* at 31) that the *Power Reactor* case "has resulted in the Commission leaning backward in establishing legal procedures which in some respects go further than the statutory requirements."

Commission's Division of Licensing and Regulation was empowered to authorize future changes in the licensee's operations entailing an alteration in the technical specifications of the license, without holding a public hearing, when the Director "determines that the proposed * * * [amendment] does not present significant hazards considerations not described or implicit in the application * * * [for the underlying license] upon finding that there is reasonable assurance that the health and safety of the public will not be endangered" (*id.* at 543).[19] This innovation was noted in the 1961 JCAE staff report, which quoted the applicable portions of the Commission's memorandum decision approving the *Vallecitos* license amendment (see note 19, *supra*).

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[19] The license amendment also provided guidance as to procedures applicable when a licensee wished to take action to change its facilities or procedures, or to conduct experiments, which did not require changes in its license specifications but which nonetheless involved "an unreviewed safety question" (*id.* at 541). Under the *Vallecitos* decision such actions, like license amendments, required Commission approval after a public hearing unless determined to present "no significant hazards consideration" not previously addressed. The effect of the provisions of the *Vallecitos* license amendment announcing these procedures (reported in pertinent part in *General Electric Co., supra*, 1 A.E.C. at 543), was summarized by the Commission in its "Memorandum and Order" as follows (*id.* at 541):

> The license * * * makes it clear GE has complete freedom to make changes within the parameters of the technical specifications, provided no unreviewed safety question is involved. The Licensee has no authority to proceed with changes in doubtful cases. All questions of doubt must be resolved by referring the proposed change to the Division of Licensing and Regulation. If the Director, Division of Licensing and Regulation, can make a finding that the proposed test or experiment presents no significant new hazards considerations, he may proceed to authorize the change. A copy of the finding and change authorization shall be filed in the public record. If the Director, Division of Licensing and Regulation, finds there is a significant new hazard consideration, he will refer the request to the Advisory Committee on Reactor Safeguards and schedule it for hearing in accordance with applicable procedures.

The report accurately stated the effect of the amendment, and suggested further innovation along the same lines:

> [T]he Commission permitted a redrafting of the technical specifications to eliminate unnecessary details, thus granting the licensee greater freedom of operations, *and permitting the staff to determine which cases might be approved at the staff level, and which required A[dvisory] C[ommittee on] R[eactor] S[afeguards] review and a public hearing.* The Commission's * * * solution * * * represented a step forward, although further consideration should be given to the possibility of approval of important changes by notice of proposed action, rather than a public hearing.

Improving the AEC Regulatory Process, supra, Vol. I at 37 (emphasis added). The staff report suggested that the Commission's operations would be improved if the Commission exercised increased discretion as to the need for public hearings on minor license amendments, by adopting the *Vallecitos* procedures as standard operating procedure (*id.* at 73 & n.4; emphasis added):

> Changes in a reactor's design or mode of operation involving changes in technical specifications and hence entailing changes in the construction permit or license should, if approved by the AEC staff, be submitted to the [proposed Atomic Safety and Licensing] Board to determine whether a hearing should be held to consider them.[4] If the Board concludes that no hearing is necessary, it should issue a notice of its proposed decision for publication in the Federal Register, to be effective no less than a specified period after publication.

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[4] At present technical specifications are required by the Atomic Energy Act of 1954 (§ 182) to be a part of the license. These have inculded many details of no importance from the safety standpoint. The handling of changes would be facilitated if the Commission's recent order in the *Vallecitos* case, could be broadened by statute or regulation to a general

> rule. This order incorporates in the license only those technical specifications and operating parameters which have special significance for safety. * * * *This area is one in which considerable clarification could be achieved over a period of time through rules issued by the Board to govern the question of when proposed changes should be submitted to it to determine whether a hearing should be held.*

Shortly after publication of the JCAE staff report in March, 1961, the AEC, on April 8, promulgated a proposed rule giving the procedures developed in the *Vallecitos* proceeding general applicability, providing an opportunity for public comment thereon. 26 Fed. Reg. 3030, 3031 (1961). In the introductory commentary, the Commission summarized the effect of the proposed regulation (*id.* at 3030):

> the Commission may authorize a proposed change, test or experiment upon determining that it does not involve significant hazards considerations not described or implicit in the hazard [*sic*] summary report and upon finding that there is reasonable assurance that the public health and safety would not be endangered.[20]

After consideration of comments received in response to the April 1961 draft, the Commission promulgated a final rule, 10 C.F.R. 50.59 (1963), on June 9, 1962, providing in pertinent part (27 Fed. Reg. 5493; J.A. 25):

> (e) With respect to request [*sic*] for changes, tests, or experiments or for changes in technical specifications * * *:
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> (1) If the Commission determines that the proposed change, test or experiment presents significant hazards considerations not described or implicit in the hazards summary report it will refer the request to the Ad-

[20] A hazards summary report was the report submitted by the licensee for evaluation by the Commission of health and safety considerations when application is made for a construction permit or operating license. 10 C.F.R. 50.34 (1963). This document is now known as the "Safety Analysis Report." 10 C.F.R. 50.34(a), (b).

visory Committee on Reactor Safeguards and will order a public hearing in accordance with applicable procedures. * * *

(2) If the Commission determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the hazards summary report, it may authorize such change, test or experiment, without referral to the Advisory Committee on Reactor Safeguards for a report and without a prior public hearing, upon finding that there is reasonable assurance that the health and safety of the public will not be endangered.

c. Although the *Vallecitos* decision and its subsequent codification at 10 C.F.R. 50.59 (1963) gave the AEC the means to process efficiently minor license amendments for power reactors, the Commission still bore the burden, imposed by the 1957 amendment to Section 189(a), of conducting public hearings at both the construction permit and the operating license phases of a power reactor licensing proceeding, whether or not the application was contested. Moreover, the Commission believed itself obliged to hold mandatory hearings on significant license amendments. These matters and the recommendations of the JCAE staff were reviewed during oversight hearings conducted by the JCAE in June 1961. See *Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy*, 87th Cong., 1st Sess. (1961).[21] On Au-

[21] The AEC's and JCAE's divergent interpretations of the Commission's obligations respecting significant license amendments were aired in a colloquy between Commissioner Olson and JCAE Chairman Holifield during the 1961 hearings (*id.* at 303-304). In response to a suggestion that the Commission was holding hearings the 1957 amendments did not require, Commissioner Olson replied (*ibid.*).

MR. OLSON. * * * In my firm legal opinion we followed the law. In view of the history of these amendments, I don't

gust 15, 1961, JCAE Chairman, Representative Holifield, and Vice Chairman, Senator Pastore, introduced identical bills incorporating the JCAE staff's suggestions for improvements in the AEC regulatory process. H.R. 8708, 87th Cong., 1st Sess. (1961) (107 Cong. Rec. 15879 (1961)); S. 2419, 87th Cong., 1st Sess. (1961) (107 Cong. Rec. 15882 (1961)). Both bills were referred to the Joint Committee on Atomic Energy, which deferred action pending further study. Similar bills were introduced in the next session of Congress. H.R. 12336, 87th Cong., 2d Sess. (1962) (108 Cong. Rec. 11977 (1962)); S. 3491, 87th Cong., 2d Sess. (1962) (108 Cong. Rec. 12235 (1962)).

Additional hearings were held on April 17, 1962. *AEC Regulatory Problems: Hearing on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 87th Cong., 2d Sess. (1962) (*1962 Hearing*). Senator Pastore opened the 1962 hearings by posing the question: "Is the AEC procedure still too cumbersome in considering proposed minor changes to operating reactors when no significant safety questions are presented?" *Id.* at 1. Commissioner Olson of the AEC responded noting, *inter alia*, the then-proposed amendments to 10 C.F.R. Part 50 (1963) governing routine

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think we would have been authorized to take much license with interpretation of this section. The proper place to get interpretation of language of this sort is before the Congress. As I have indicated, we would now recommend that there be a relaxation of this section of the law, but I think that this is a matter of legal opinion, and it was our considered opinion that these hearings were necessary.

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CHAIRMAN HOLIFIELD. So regardless of what has happened in the past, there does seem to be a meeting of minds on the problem of relaxation of what you consider from the legal point is a mandatory position in order that you might proceed administratively and in a less formal way?

MR. OLSON. That is right, Mr. Chairman. I think that everyone pretty well agrees that if you trust us now that it is high time we be given some discretion in this field.

license amendments. *1962 Hearing* 2-3.[22] Senator Pastore returned to that subject, stating (*id.* at 6):

> [Y]ou mention the proposed amendments to part 50 clarifying the extent to which licensees may make changes and conduct tests and experiments not specifically provided for in their operating licenses.
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> How does this work? What has been the experience of the Commission under the rule of the *Vallecitos* case?

The AEC commissioner replied (*ibid.*):

> I feel that the course that we chose in the *Vallecitos* case of allowing the Division of Licensing and Regulation to make a determination as to whether an unreviewed safety issue was involved has cut out nine-tenths of the hearings. There is no question but what in our eagerness to give full compliance to the law, as we found it on the books, that we painted ourselves into a corner. We were holding more hearings than we could handle. It was not because we wanted to. It was because we thought we were obliged to under the law. I think as a result of the understanding that was reached after our hearings last year in which we found it was the will of the committee—that their intent with respect to the amendment that they had put into the law—was that they did not quite share our literal interpretation of it, I think we arrived at a very workable result. I think it has really taken the bottleneck out of our hearing process. We were holding hearings on every change—the technical specifications included entirely too many things—and I think that the changes that resulted from the *Vallecitos* case have been extremely helpful to everybody.

Shortly after the close of the Committee hearings, the AEC made final the regulations embodying the *Vallecitos* rule, 10 C.F.R. 50.59(e)(2) (1963) (27 Fed. Reg. 5493 (1962); J.A. 25). Then, on July 5, 1962, the Joint

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[22] The pendency of the proposed 10 C.F.R. 50.59 (1963) was expressly noted in a tabulation contained in an appendix to the hearing. *1962 Hearing* 109.

Committee reported out S. 3491, *supra*, and H.R. 12336, *supra*, the 1962 amendments to the Atomic Energy Act. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962); H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962).[23] The proposed amendment to Section 189(a), which was ultimately enacted without change, limited the scope of the second sentence of that provision, providing for mandatory hearings, which had been added in 1957 to proceedings to issue a construction permit, and added what is now the third and fourth sentences of Section 189(a):

> In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. *The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.*

S. Rep. No. 1677, *supra*, at 16-17 (emphasis deleted).

The Committee Reports described the amendments to Section 189(a) as follows:

> [T]he bill amends section 189 a. of the Atomic Energy Act of 1954 by relaxing the mandatory hearing requirement. Under the terms of this section, a hearing will be mandatory only on the application for issuance of a construction permit.
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> At the "Radiation Safety and Regulation" hearings in June 1961 and at the 1962 regulatory hearings, there was substantial unanimity of opinion that

[23] The Senate Report accompanied S. 3491, *supra*, and the House Report, the identical H.R. 12336, *supra*. The text of the two reports is essentially identical, each being the product of the Joint Committee on Atomic Energy.

the mandatory hearing requirement of the act with respect to power and testing facilities should be relaxed. The second hearing on the operating license was regarded, by most witnesses, as unnecessary and burdensome in the absence of bona fide intervention.

Accordingly, this section will eliminate the requirement for a mandatory hearing, except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. *It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

This amendment, although relaxing the mandatory hearing requirement, should not prejudice the public interest in reactor safety determinations. A mandatory hearing will still be held at the critical point in reactor licensing—the construction permit stage—where the suitability of the site is to be judged. Succeeding regulatory actions will take place only upon publication and sufficient advance notice to afford an interested party the opportunity to intervene. In these succeeding stages, if a hearing is not held, the decision would still be on the public record and if an important safety question was involved, could be made by the Board.

The committee is cognizant of the provisional construction permit procedure which allows the issuance of a permit, subject to further research and development work, before becoming final. When this research and development work is directed toward the resolution of a difficult safety problem of unusual

public importance, it is expected that the Commission, on its own motion, would order a hearing before significant amendments or authorization for the final construction permit were issued. In any event, under the provisions of this section, an aggrieved party would be given the opportunity to intervene.

Finally, it is expected that the authority given AEC to dispense with notice and publication would be exercised with great care and only in those instances where the application presented no significant hazards consideration.

S. Rep. No. 1677, *supra*, at 7-8; H.R. Rep. No. 1966, *supra*, at 7-8 (emphasis added). The 1962 amendments, establishing the present text of Section 189(a), were passed in each house, with no significant debate, after the ranking members of the Joint Committee on Atomic Energy, Senator Pastore and Representative Holifield respectively, briefly, and in essentially identical terms, summarized the provisions of the bill. 108 Cong. Rec. 15746 (1962) (remarks of Sen. Pastore); 108 Cong. Rec. 16548 (1962) (remarks of Rep. Holifield).

d. On December 8, 1962, after providing notice and an opportunity for public comment (see 27 Fed. Reg. 10706 (1962)), the AEC promulgated changes in its regulations intended to effectuate the 1962 amendments (27 Fed. Reg. 12184 (1962)). The changes included a revision of 10 C.F.R. 50.58(b) (1963) to read as follows:

§ 50.58 Hearings and report of the Advisory Committee on Reactor Safeguards.

* * * * *

(b) The Commission will hold a hearing after 30 days' notice and publication once in the FEDERAL REGISTER on each application for a construction permit * * *. When a construction permit has been issued for such a facility following the holding of a public hearing and an application is made for an operating license or for an amendment to a construction permit or operating license, the Commission may hold a hearing after 30 days' notice and publication

> once in the FEDERAL REGISTER or, in the absence of a request therefor by any person whose interest may be affected, may issue an operating license or an amendment to a construction permit or operating license without a hearing, upon 30 days' notice and publication once in the FEDERAL REGISTER of its intent to do so. *If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, it may dispense with such notice and publication and may issue the amendment.*

27 Fed. Reg. 12186 (1962) (emphasis added).[24] This provision has been a part of the Commission's regulations continuously from that time through the present. See 10 C.F.R. 50.58(b).[25]

e. As the foregoing account of the legislative and administrative history behind Section 189(a) of the Atomic Energy Act should make painfully clear, the Commission's practices and interpretation of its hearing obligations are the product of continuous supervision by Congress, including on two occasions, statutory changes needed to achieve the desired balance between comprehensiveness and flexibility of regulation. And it should be equally clear that in enacting the 1962 amendments Congress deliberately adopted the Commission's practice of dispensing with an opportunity for a hearing prior to

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[24] We have been advised by the Nuclear Regulatory Commission that a copy of this provision was transmitted to the Joint Committee shortly before it was published. Letter from H. L. Price to Representative Holifield, Dec. 6, 1962.

[25] The separate provision to this effect first adopted, 10 C.F.R. 50.59(e)(2) (1963), was deleted in 1974 as part of a general simplification of the Commission's regulations. See 38 Fed. Reg. 22796 (1973); 39 Fed. Reg. 10554, 10555 (1974). Under the revised provision, 10 C.F.R. 50.59(c), currently in effect, changes in technical specifications are simply defined as license amendments subject to the amendment procedure prescribed in 10 C.F.R. 50.90 and the rules governing hearings on such amendments, at 10 C.F.R. 50.58(b).

action on an application for an amendment determined to involve "no significant hazards consideration." Although the language of the statute is, perhaps, unfortunately opaque in this regard, the intention of Congress is unmistakably revealed through the succession of reports and hearings in which the Joint Committee criticized the Commission's prior practice of holding hearings on every license amendment, however insignificant, the Commission's innovative response in the *Vallecitos* proceeding and the regulations, 10 C.F.R. 50.58 and 50.59, codifying that practice, and, most vividly, the House and Senate Reports which expressly incorporate by reference "AEC Regulation 50.59." S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8. It is difficult to imagine how legislative history could more strikingly reveal the intention of Congress.[26]

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[26] Congress' intention to empower the Commission to dispense with hearings on amendments determined to present no significant hazards consideration is corroborated by separate provisions of the 1962 amendments, amending Section 182(b) of the Act, 42 U.S.C. 2232(b), to underscore the Commission's discretion to decline to refer proposed license amendments to the Advisory Committee on Reactor Safeguards for review where the amendments are deemed routine. The Committee Reports describe the change in Section 182(b) as a "clarifying amendment" needed to overcome the Commission's unduly rigid interpretation of the previous terms of that section as requiring referral to the ACRS of all amendments no matter how routine, by "reliev[ing] * * * [the ACRS] of the necessity to review and report on amendments which do not raise significant safety questions * * *." S. Rep. No. 1677, *supra*, at 8-9; H.R. Rep. No. 1966, *supra*, at 8-9. Under the *Vallecitos* decision (1 A.E.C. at 543) and the newly adopted 10 C.F.R. 50.59(e)(1) and (2) (1963) (see pages 24-25, *supra*), the question whether a public hearing was required and the question whether a referral to the ACRS was required were both governed by the "no significant hazards" criterion. The Joint Committee adopted the same standard, noting that "where an amendment presents a significant hazards consideration, referral to the ACRS should follow." S. Rep. No. 1677, *supra*, at 9; H.R. Rep. No. 1966, *supra*, at 9. The Committee stressed the intimate relationship between the several provisions affecting the Commission's procedures

Legislative history cited by the court of appeals (80-1640 Pet. App. 17a-22a) does not, on examination, support its interpretation of Section 189(a). The court below relied primarily (*id.* at 17a-19a) upon the fact that the primary avowed purpose of the 1962 amendments to Section 189(a) was to eliminate the requirement of mandatory hearings with respect to uncontested applications for operating licenses and amendments to construction permits and operating licenses. While it is no doubt true that the preponderance of Congress' attention was directed to the distinct problem of limiting hearings in proceedings where no one wanted one, that objective was fully achieved by the limitation of the mandatory hearing requirement imposed by the second sentence of Section 189(a) to applications for initial construction permits, and the addition of the third sentence of Section 189(a), which underscores the Commission's authority to dispense with a hearing when none is requested in all other types of proceedings. The court of appeals' interpretation of the legislative history thus fails to ascribe any independent purpose or effect to the fourth sentence of Section 189(a), which was also added by the 1962 amendments, and which deals with the distinct problem of routine amendments, whether or not contested.

Perhaps because the Joint Committee was aware (see pages 22-24, 26-27 & note 22, *supra*) that the Commission had already dealt with the latter problem by regulation, the fourth sentence of Section 189(a) was given relatively little attention in the Joint Committee Report, and was not mentioned at all in the very brief summaries of the

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in the 1962 amendments, concluding that to the extent the amendments achieve the desired "results, further confidence will accrue in the decision to relax the requirements for mandatory hearings and referrals to the ACRS." *Ibid.* Accordingly, it is reasonable to assume that, in conformity with 10 C.F.R. 50.59 (1963), Congress intended that a finding of "no significant hazards consideration" authorize both the omission of a hearing and of referral to the ACRS, in the exercise of the Commission's discretion.

amendments given by Representative Holifield and Senator Pastore on the floor of their respective houses of Congress. See 108 Cong. Rec. 15746, 16548 (1962). But, however brief, the mention given the fourth sentence in the Report of the Joint Committee is nonetheless compelling—for it incorporates the Commission's new regulation, 10 C.F.R. 50.59 (1963), by reference.[27] In any event, the sparseness of the discussion of the fourth sentence of Section 189(a) in the legislative history cannot establish that Congress' sole purpose was to restrict the mandatory hearing required in uncontested cases. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

Other materials cited by the court of appeals in support of its conclusion are equally unavailing. The court quotes from the very portion of the Report of the Joint Committee on Atomic Energy we have quoted above pages 28-30, *supra*) to demonstrate that Congress did *not* intend to permit the Commission to dispense with a hearing in advance of its action upon an amendment involving no significant hazards consideration. But the court of appeals simply edited out the key sentence of that passage referring to "AEC Regulation 50.59," thereby reversing the significance of the Report. Similarly, the court of appeals' reliance (80-1640 Pet. App. 20a) on a passage from the 1961 JCAE Staff Report, *Improving the AEC Regulatory Process, supra*, is misplaced, for, read in context, the passage does not suggest that a hearing in

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[27] Stressing that the Committee Report literally invokes "the criterion" applied under 10 C.F.R. 50.59 (1963) (Br. in Opp. 10-11), respondents appear to suggest that Congress did not intend to adopt the actual procedure contemplated by that rule. In light of Congress' express citation of the Commission's regulation, the Joint Committee's awareness of the *Vallecitos* decision and its urgings that it be codified in a regulation, we think it incredible to suppose that Congress, while fully aware of the Commission's practices regarding *hearings* on amendments entailing no significant hazards consideration, and while engaged in clarifying the Commission's hearing obligations, meant effectively to disapprove the Commission's practices, as respondents suggest.

advance of Commission action is required.[28] Finally, the statements by Representative Holifield and Senator Pastore summarizing the 1962 amendments on the floor of each house cited by the court of appeals (80-1640 Pet. App. 21a) are simply inapposite because they refer only to the effect of the third sentence of Section 189(a). 108 Cong. Rec. 16548 (1962) (remarks of Rep. Holifield); *id.* at 15746 (remarks of Sen. Pastore).[29]

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[28] The passage involved is quoted at pages 20-21, *supra*. The JCAE staff's reference to preservation of "an opportunity to any interested party to intervene" is qualified by langauge, omitted by the court of appeals, which followed immediately: "with respect to any *new* matter raised by the action." *Improving the AEC Regulatory Process*, *supra*, Vol. I at 50 (emphasis added). So qualified, the inconsistency suggested by the court of appeals evaporates. In any event, contrary to the court of appeals' assumption, the opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission (see 80-1640 Pet. App. 38a & n.6). Congress had good reason to be aware of the possibility of after-the-fact hearings, by reason of the *Power Reactor* case. See pages 17-18, *supra*. Although Congress responded to *Power Reactor* in 1957 by requiring hearings whether or not requested, the 1962 amendments limited the mandatory advance hearing requirement to proceedings on construction permit applications. See page 40, *infra*.

[29] Each legislator stated (*ibid.*):

> [T]he bill relaxes the mandatory hearing requirement in section 189 of the Atomic Energy Act. Under existing law, a hearing must be held on the application for a construction permit and on the application for an operating license. Under the terms of the committee's amendment, a hearing will be required only on the construction permit, which is really the critical point in reactor licensing—the point at which the suitability of the reactor site is determined. This amendment in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion.

Even if the closing sentence of these comments were read to refer to the fourth sentence of Section 189(a), as amended, it does not necessarily require that a hearing be held prior to action by the Commission. See page 34 note 28, *supra*, and page 40, *infra*.

2. Contrary to the court of appeals' suggestion (80-1640 Pet. App. 16a; see page 11, *supra*), the result reached below is not required by the language of Section 189(a). Although the last sentence of Section 189(a) does not expressly refer to omission of the opportunity for a hearing in advance of any action by the Commission, the context of that sentence removes any ambiguity. The sentence at issue provides (emphasis added):

> The Commission may dispense with *such thirty days' notice and publication* with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The obvious referent for the language underscored is the preceding sentence which authorizes the Commission to dispense with a hearing in considering an application for an operating license or an amendment thereto or to a construction permit whenever none is requested, but which requires "thirty days' notice and publication once in the Federal Register of its intent to do so"—*i.e.* the Commission's intent to proceed without a hearing. 42 U.S.C. 2239(a). Inasmuch as the Commission is authorized under the fourth sentence to proceed without providing notice of its intent to issue an amendment without first holding a hearing whenever it determines that "no significant hazards consideration" is involved, it necessarily follows that the Commission is in fact entitled to dispense with a hearing.[30]

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[30] Respondents now suggest (Br. in Opp. 11, 12) that the fourth sentence of Section 189(a) is merely a qualification upon the third sentence, and that the fourth sentence accordingly merely authorizes the Commission to dispense with the notice of its intent to proceed without a hearing in cases where the third sentence of Section 189(a) authorizes the Commission to omit a hearing. That interpretation, which appears to differ from that adopted by the court of appeals (compare 80-1640 Pet. App. 16a-17a & n.20 with

In order to avoid this result, the court of appeals seemingly assumed (see note 31, *infra*), contrary to our reading, that the notice and publication which the Commission is authorized to omit under the final sentence of Section 189(a) does not include notice of the Commission's intent to proceed without first holding a hearing, but is only notice of the pendency of an amendment (see 80-1640 Pet. App. 15a-17a & n.20). Not only is this view at odds with the language of Section 189(a), but, as the court of appeals was obliged to acknowledge, under its interpretation "the third and fourth sentences of § 189(a), when read together, produce[] in theory a somewhat paradoxical result" for "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" (*id.* at 16a-17a n.20).[31] But accepting, *arguendo*, the court of appeals'

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id. at 20a n.24; see text, page 37 & note 31, *infra*) cannot be reconciled with the plain language of the fourth sentence which applies to "any" application for an amended operating license or construction permit found to involve no significant hazards consideration. Moreover, respondents' suggestion fails to account for the fact that the fourth sentence of Section 189(a), unlike the third sentence, does not apply to the initial issuance of an operating license. In any event, respondents' interpretation is at odds with the clear import of the legislative history, which adopts the Commission's practice under 10 C.F.R. 50.59 (1963), which was applicable whenever a no significant hazards determination was made, whether or not a hearing had been requested.

[31] The opinion below is not entirely consistent in its reading of the last sentence of Section 189(a). Elsewhere in the paragraph just quoted the court of appeals describes that sentence of Section 189(a) as authorizing "NRC * * * [to] issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so," (80-1640 Pet. App. 17a n.20) while in yet another instance the opinion states "the fourth sentence * * * dispenses with 30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing" (*id.* at 20a n.24; emphasis in original). Nevertheless, it seems reasonably clear that the court assumed that it was notice of the pendency of an amendment (as to which a hearing right exists) which the Commission may

premises (see page 37 note 31, *supra*), its "resolution" of the paradox created by its decision (80-1640 Pet. App. 16a-17a n.20), is unpersuasive. Whether or not individuals manage to learn of agency plans in time to seek a hearing without any formal notice or publication, and whether or not some independent provision of law might impose a notice requirement of some kind as the court of appeals suggested—questions not presented here—it should be doubted that Congress deliberately sought to discourage individuals from learning of agency action in time meaningfully to exercise the right to a hearing, where such a right exists. The only tenable reading of the final sentence of Section 189(a) is that no hearing is required prior to approval of a license amendment in circumstances where the Commission is authorized to dispense with notice of its plans to act: the obvious purpose of a notice requirement is to protect and make meaningful a right to a hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974).

In short, it is the court of appeals rather than the Commission which has strayed from the "plain language"

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omit under the fourth sentence, rather than notice of its intention to proceed without a hearing. It may be that the court of appeals envisioned that the notice required by the third sentence of Section 189(a) which the Commission was authorized to omit when acting under the fourth sentence of that section was a combined notice alerting the public to the pendency of an amendment, and providing 30 days' notice of the availability of a hearing and thus of the Commission's intention to proceed if none were to be requested. This interpretation of the third sentence of Section 189(a) is supported by the legislative history of the 1962 amendments to Section 189(a) (S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8 (see page 29, *supra*)), and has been adopted by the Commission. 10 C.F.R. 2.105(d), (e). But even so, the court of appeals overlooked the fact that one element of notice authorized to be omitted upon a finding of no significant hazards consideration was that aspect which signals the Commission's prerogative to proceed without a hearing.

ct Section 189(a), and thereby unnecessarily created a "paradoxical result." [32]

3. The court of appeals erroneously failed to defer to the Commission's long-standing interpretation of Section 189(a). As is demonstrated above, this "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" was scrutinized and endorsed by Congress at its inception, and commands particular deference. *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *CBS, Inc.* v. *FCC*, Nos. 80-207, *et al.* (July 1, 1981), slip op. 12-13; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Commission has interpreted the no significant hazards criterion in a way which makes meaningful the right of public participation established by Section 189(a), by evaluating the need for a hearing in terms of whether the proposed license amendment entails hazards issues different in gravity, degree, or kind, from those

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[32] In addition to reliance upon "plain language" and legislative history analyses, the court of appeals rested its decision upon its prior decision in *Brooks* v. *Atomic Energy Commission, supra*, 476 F.2d at 927. But in *Brooks* the court of appeals noted that the Commission had failed to determine that the license amendment at issue entailed no significant hazards consideration, and accordingly could in no event rely on the last sentence of Section 189(a) to excuse its failure to afford an opportunity for a hearing. The *Brooks* panel's further suggestion that Section 189(a) did not allow omission of hearing where one is requested must accordingly be deemed *dictum*, or at most an alternative holding. There was, for that reason, no occasion for the Commission to seek further review of this aspect of *Brooks*. Moreover, language in *Union of Concerned Scientists* v. *Atomic Energy Commission, supra*, 499 F.2d at 1084 n.36, consistent with the Commission's interpretation of Section 189(a), militated against the conclusion that *Brooks* represented carefully considered *dictum* on this point, especially inasmuch as Judge Bazelon sat on both panels. In any event, nothing in *Brooks* adds any weight to the court of appeals' decision.

which have been previously evaluated.[33] Accordingly, the Commission's reading of Section 189(a) cannot result in denial of a hearing opportunity on an amendment entailing materially new hazards issues. And the Commission remains willing to entertain requests for a hearing filed after action upon a license amendment, thereby allowing an opportunity for members of the public to point out any novel hazards consideration believed to have been overlooked by the Commission. See note 33, *supra*.[34]

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[33] Proposed regulations codify this interpretation. 10 C.F.R. 50.91(b) would provide (45 Fed. Reg. 20493 (1980)):

> In making the determination that a proposed amendment to a license or a construction permit involves no significant hazards consideration, the Commission will consider whether operation of the facility in accordance with the proposed amendment would (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of an accident of a type different from any evaluated previously, or (3) involve a significant reduction in a margin of safety.

A negative evaluation on all three scores is necessary before the Commission will reach a "no significant hazards" determination. Proposed 10 C.F.R. 50.91(c) (45 Fed. Reg. 20493 (1980)). The court of appeals expressly noted its view that these regulations are *ultra vires* insofar as they fail to require a hearing if requested prior to approval of an amendment (80-1640 Pet. App. 22a n.26).

The notice accompanying the proposed regulation also records the Commission's willingness to entertain requests for an after-the-fact hearing on amendments determined not to present a significant hazards consideration.

[34] The Commission's conclusion that an amendment involves no significant hazards consideration is of course subject to judicial review, as is the lawfulness of the accompanying substantive decision, under the provisions of the Administrative Procedure Act, 42 U.S.C. 2231, 2239(b). Amendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review. Examples of amendments commonly found to entail no significant hazards consideration are set forth at 45 Fed. Reg. 20492 (1980). See also 80-1656 Pet. App. 63a-64a.

Unlike the Commission's "practical administrative construction" of the disputed statutory provision, which the court of appeals was bound to give substantial weight, *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, the interpretation of Section 189(a) propounded by the court below would frustrate the purpose of the Atomic Energy Act by imposing substantial and novel administrative burdens on the Commission, which threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both (see 80-1640 Pet. App. 31a-34a). The Nuclear Regulatory Commission has informed us that, in the past four years, it has approved more than 1600 amendments to nuclear power plant operating licenses which, it determined, entailed no significant hazards consideration. The annual average of more than 400 amendments per year reflects the detailed regulation of nuclear power plant operation carried out by the Commission. A nuclear power plant operating license, like that for the TMI-2 plant, includes hundreds of pages of highly detailed technical specifications. Any change in any of the technical specifications requires an amendment to the operating license. 10 C.F.R. 50.59(a)(1), (c). Minor changes must frequently be made to accommodate routine events in the operation of a nuclear power plant. For instance, when a power plant is refueled, an event which occurs approximately every eighteen months, the technical specifications must usually be adjusted to reflect the slightly different behavior of the fresh fuel placed in the reactor core. The need for a variety of other minor license changes, such as amendments extending the time allowed for conducting tests, frequently arise.

Under the court of appeals' decision, each of these minor license amendments must be held in abeyance if a hearing is requested, notwithstanding the fact that the Commission reaches a written, reasoned, judicially-reviewable determination that the amendment entails no

significant safety question.[35] As a practical matter, it would be difficult, and in some cases impossible, for the Commission to provide a prior hearing in time to complete processing of all of the required license amendments presenting no significant hazards consideration before the changes must be implemented. The Commission informs us that since the issuance of the decision below more than a score of nuclear power plants would have had to shut down or operate at reduced power if, by reason of a hearing request, they were not accorded in a timely fashion the authority sought in a license amendment which, the Commission concluded, presented no significant hazards consideration.

The court of appeals erred by failing to adopt the Commission's practical construction of Section 189(a) which permits interested parties to seek a hearing after a license amendment entailing no significant hazards consideration has been approved. The Commission's practice has been consistent with Congress' intentions in enacting Section 189(a) of the Atomic Energy Act, and the court of appeals' imposition of more exacting and burdensome requirements for administrative practice was impermissible. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip op. 13.

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[35] The potentially burdensome effect of the court of appeals' decision is magnified by what the dissenters from denial of rehearing en banc aptly labeled (80-1640 Pet. App. 40a) an "extraordinarily broad conception of what constitutes a request for a hearing," apparently embracing all "expressions of interest" (*id.* at 21a n.25). While the issue has not been placed before this Court, it seems clear, at the least, that the Commission may require a timely and reasonably definite request for a hearing as a precondition to exercise of the rights created by Section 189(a). *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL PETITIONERS SUGGESTING MOOTNESS

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PEOPLE AGAINST NUCLEAR ENERGY

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPE
THE DISTRICT OF COLUMBIA CIR

MEMORANDUM FOR THE FEDERAL PE
SUGGESTING MOOTNESS

The issue in this case is whether Section Atomic Energy Act of 1954, 42 U.S.C. 2239 the Nuclear Regulatory Commission to am ing license for a nuclear power plant without hearing, if one has been requested, where th determines that the amendment presents hazards consideration." Because the decision appeals holding that the Commission lacks

has been overruled by recently enacted legislation this case is moot.

1. This case arose on petitions for review of orders of the Nuclear Regulatory Commission issued June 12, 1980, authorizing venting of pent-up Krypton-85 gas from the reactor containment building of the disabled Three Mile Island Unit 2 nuclear power plant, and temporarily amending the operating license for the plant so as to permit that release to be carried out expeditiously. Those orders authorized commencement of venting ten days after their issuance. No public hearing was held in advance of the effective date of the orders because the Commission determined that the operating license amendment entailed "no significant hazards consideration."

Based upon that determination the Commission concluded that the penultimate sentence of Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorized it to make the operating license amendment immediately effective, notwithstanding any request for a hearing. Accordingly, while the Commission provided that any interested person affected by the license amendment could request a hearing within thirty days of its order, it made the order effective immediately and provided that "[a] request for a hearing will not stay the effectiveness of this Order" (80-1640 Pet. App. 66a).

On June 23, 1980, Respondents Sholly and Hossler filed a petition for review of the two June 12 orders in the court of appeals, contending, inter alia, that the language of Section 189(a) relied upon by the Commission did not in fact grant authority to dispense with a requested hearing. The court of appeals denied an application for an injunction to forestall the scheduled venting on June 26, 1980, and venting was actually carried out between June 28, and July 11, 1980.

Notwithstanding the completion of venting and the expiration of the temporary amendment to the operating license for the Three Mile Island Unit 2 power plant, proceedings continued in the court of appeals.[1] Because the venting had been completed and the orders of the Commission under review had expired, the Commission, the United States and the utility intervenors argued that the case was moot. The court of appeals, however, disagreed, concluding that the question presented was "capable of repetition, yet evading review" (80-1640 Pet. App. 9a), and accordingly that the case was not moot (*id.* at 8a-13a, 27a). On the merits, the court of appeals ruled that "under section 189(a) the NRC is required to hold a hearing on license amendments whenever interested parties request one" (*id.* at 27a), and that such a hearing must be held prior to issuance of any amendment (*id.* at 22a). The court reasoned that the final sentence of Section 189(a), which the Commission had identified as the source of its authority to dispense with a hearing in advance of making effective a license amendment that entails "no significant hazards consideration," authorized the Commission to dispense with notice and publication respecting such an amendment, but did not authorize omission or deferral of a hearing that had been requested (80-1640 Pet. App. 13a-22a).

The judgment of the court of appeals was entered on November 19, 1980, and petitions for rehearing were denied on March 4, 1981. The petition for a writ of certiorari in No. 80-1640 was filed on March 30, 1981, and the petition in

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[1] A separate petition for review of the Commission's orders had been filed in the United States Court of Appeals for the Third Circuit by respondent People Against Nuclear Energy on July 8, 1980. That petition was transferred to the D.C. Circuit and consolidated with the petition filed there by respondents Sholly and Hossler. The holders of the license to operate the Three Mile Island Unit 2 nuclear power plant, Metropolitan Edison Company, et al., petitioners in this Court, intervened as respondents in the court of appeals.

No. 80-1656 was filed on April 2, 1981. The petitions were granted and the cases consolidated on May 26, 1981. 451 U.S. 1016.

2. After this case had been briefed, the pendency of legislative proposals that would moot this case by granting or reaffirming the authority held to be lacking by the court of appeals came to the attention of the parties. Accordingly, on November 16, 1981, the Court granted the petitioners' joint motion to defer the oral argument that had been scheduled for the week of December 7, 1981. 454 U.S. 1050. Subsequently, in view of further progress in the legislative process, respondents moved to again postpone oral argument, which had been rescheduled for October 6, 1982, explaining that the "proposed legislation, if enacted might well * * * moot this appeal" (Respondent's Motion to Postpone Oral Argument at 2). Petitioners did not oppose that motion. On September 9, 1982, the Court granted the motion for further deferral of oral argument.

3. On January 4, 1983, the President signed into law Public Law No. 97-415, 96 Stat. 2067. Pertinent portions of that Act are reproduced as an appendix to this memorandum. Section 12(a) of Pub. L. No. 97-415 redesignates the pre-existing text of Section 189(a) as Section 189(a)(1), and adds, inter alia, the following new language to form a part of Section 189(a)(2)(A):

> The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing.

Provisions of the new Section 189(a)(2) that follow the above-quoted language prescribe the procedures to be employed by the Commission in exercising this authority. See App., *infra*, 2a. The Conference Report accompanying the bill enacted into law (H.R. Rep. No. 97-884, 97th Cong., 2d Sess. (1982), accompanying H.R. 2330, 97th Cong., 2d Sess. (1982)) describes the pertinent language as "The 'Sholly' Provision" (H.R. Rep. No. 97-884, *supra*, at 36), and affirms (*id.* at 37) that under the bill:

> [T]he NRC may issue and make immediately effective a no significant hazards consideration amendment to a facility operating license before holding a hearing upon request of an interested party.[2]

4. This case is now moot. Public Law No. 97-415 overruled the decision of the court of appeals by vesting the Commission with authority to dispense with advance hearings on license amendments determined to entail no significant hazards consideration. Moreover, the new legislation prescribes both the circumstances in which that authority may be used and the procedures to be employed in that connection. Because the issue decided by the court of appeals—the state of the law prior to the recent amendment to Section 189(a)—can no longer affect the rights of the parties, these cases are moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974). This is especially so because the

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[2]Because the House of Representatives rejected Section 23 as it appeared in the conference committee bill, a provision that has no bearing upon the issue in this case, while adopting the rest of the conference report, including Section 12 of the bill, see 128 Cong. Rec. H8809, H8817, H8826 (daily ed. Dec. 2, 1982), and because the bill finally passed by both Houses contained a different version of Section 23, the manager of the bill on behalf of the Senate took care to underscore that the Conference Report was intended to provide the authoritative legislative history of the balance of the legislation enacted. 128 Cong. Rec. S15314 (daily ed. Dec. 16, 1982) (remarks of Sen. Simpson).

concrete controversy that triggered filing of the petitions for review in the court of appeals had expired even before the court of appeals rendered its judgment; the case was adjudicated based on the court of appeals' determination that the controversy was "capable of repetition, yet evading review" (80-1640 Pet. App. 9a, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)). Plainly, the enactment of Pub. L. No. 97-415 eliminates all possibility that the legal controversy that spawned this case will be repeated.

Because this Court has previously determined that the decision of the court of appeals warranted further review, and because the effect of the enactment of legislation mooting this case is to eliminate the occasion for that review, this Court should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while pending this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the petitions for review as moot. See, e.g., *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

The private petitioners have authorized us to indicate that they join in this suggestion of mootness.

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated, and the case remanded with instructions to dismiss the petitions for review as moot.

REX E. LEE
Solicitor General

JANAURY 1983

APPENDIX

H.R. 2330—Public Law 97-415

[96 Stat. 2067]

Ninety-seventh Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eight-two

An Act

To authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes.

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled,

* * * * *

OPERATING LICENSE AMENDMENT HEARINGS

SEC. 12. (a) Section 189 a. of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) is amended—

(1) by inerting "(1)" after the subsection designation; and

(2) by adding at the end thereof the following new paragraph: "(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of

the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

"(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

"(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispending with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located."

(b) The authority of the Nuclear Regulatory Commission, under the provisions of the amendment made by subsection (a), to issue and to make immediately effective any amendment to an operating license shall take effect upon the promulgation by the Commission of the regulations required in such provisions.

Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1640, 80-1656

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Petitioners,*

v.

STEVEN SHOLLY, *Et Al., Respondents.*

METROPOLITAN EDISON COMPANY *Et Al., Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY *Et Al., Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY *ET AL.*

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July 31, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a), authorizes the Nuclear Regulatory Commission to amend a nuclear power plant operating license without first holding a hearing if one is requested, where the Commission determines that the amendment presents "no significant hazards consideration."*

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* In both No. 80-1640 and No. 80-1656, petitioners in the Court of Appeals below (respondents herein) were Steven Sholly, Donald Hossler and People Against Nuclear Energy; respondents in the Court of Appeals were the United States of America, the United States Nuclear Regulatory Commission, and John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford. Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("the public utilities") were intervenor-respondents in the Court of Appeals.

The Court is advised pursuant to Rule 28.1 of the Rules of the Supreme Court that General Public Utilities Corporation is the parent company of the public utilities and that GPU Service Corporation, Saxton Nuclear Experimental Corporation and GPU Nuclear Corporation are affiliates or related companies to the public utilities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1640
No. 80-1656

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Petitioners,*

v.

STEVEN SHOLLY, *Et Al., Respondents.*

METROPOLITAN EDISON COMPANY *Et Al., Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY *Et Al., Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY *ET AL.*

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("the public utilities"), petitioners in No. 80-1656, submit this brief on the merits in these consolidated cases.

OPINIONS BELOW

The orders of the Court of Appeals denying the public utilities' petition for rehearing and suggestion for rehearing *en banc,* with a dissenting statement filed by four Judges (App. A and B to the public utilities' certiorari petition (hereinafter "Utilities' Pet.")) have not yet been reported. The panel decision of the Court of Appeals (Utilities' Pet., App. C) also has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1980. The appellate court's orders denying rehearing and rehearing *en banc* were entered on March 4, 1981. Petitions for writs of certiorari filed by the public utilities and by the government were granted on May 26, 1981. J.A. 109-10. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954 ("the Act"), as amended, 42 U.S.C. §2239(a), provides in relevant part:

> In any proceeding under this Chapter, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT OF THE CASE

This case arises from consolidated petitions to review two Orders issued on June 12, 1980 by the Nuclear Regulatory

Commission ("the Commission"). These Orders relate to cleanup activities undertaken after the accident at Three Mile Island Nuclear Station, Unit 2 ("TMI-2") owned by the public utilities.

The Court of Appeals below entered a declaratory judgment that the Orders were issued unlawfully because the Commission failed to hold a prior hearing on them, which hearing by implication had been requested by respondents. The issue in this case is whether the Commission is authorized by Section 189(a) of the Act to amend an operating license for a nuclear power plant without holding a prior hearing where one is requested *if* the Commission makes a finding that the license amendment has no health or safety significance.

The March 28, 1979 accident at TMI-2 resulted in serious damage to the nuclear fuel inside the reactor and accumulation of radioactive krypton-85 gas in the reactor containment building. Removal of the gas was necessary so that decontamination and cleanup of the facility could proceed. Utiiities' Pet., App. D at 45a-46a.

The operating license for TMI-2 issued by the Commission in February 1978 authorized limited releases of radioactive gases, including krypton-85, to the atmosphere. Utilities' Pet., App. D at 46a. Such releases are a normal and necessary part of nuclear power reactor operation and are common to all operating nuclear reactors. In the aftermath of the accident, the Commission undertook certain regulatory actions affecting the cleanup and specifically considered the problems associated with the accumulation of krypton gas.

On November 21, 1979, the Commission issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67738 (1979), J.A. 36, in which it stated that significant radioactive gas releases from the TMI-2 containment building would not be allowed without prior review and opportunity for public comment. This Statement of Policy was implemented on February 11, 1980, when the Commission issued an Order

prohibiting "venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC." 45 Fed. Reg. 11282 (1980), J.A. 39, 40-41.

After months of exhaustive review and consultation (R., Vol. 2, Tab 18, 19, 21, 23, 27; Vol. 3, Tab 33, 38), the Commission issued for public comment in March 1980 a draft environmental assessment on release of the krypton gas from the reactor building. 45 Fed. Reg. 20265, 21760 (1980), R., Vol. 4, Tabs 51, 53. After consideration of the public's comments on the draft assessment,[1] the Commission issued a final environmental assessment at the end of May, 1980. R., Vol. 5, Tab 69. The final environmental assessment examined a number of possible ways of decontaminating the reactor containment building atmosphere and concluded that all decon-

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[1] The draft environmental assessment and the two subsequent addenda to it elicited about 800 written comments from individuals and organizations. R., Vol. 5, Tab 69. In addition, the Commission held public hearings and met with representatives of citizen groups in the area around TMI-2 to discuss the draft environmental assessment and the alternatives to purging. R., Vol. 4, Tab 46, 47; Vol. 5, Tab 75. The Commission also consulted with Federal, State and local government agencies and with individuals and groups in the scientific community having expertise in radiation protection and related areas. *See, e.g.*, R., Vol. 2 Tab 31; Vol. 5, Tab 56, 59, 64, 68, 80, 81, 82; R., Vol. 5, Tab 69 at 10-1, 10-2. Among those consulted or submitting comments were the U.S. Departments of Energy, Interior, Transportation and Health, Education and Welfare; the Environmental Protection Agency; the Council on Environmental Quality; the Oak Ridge National Laboratory; the National Council on Radiation Protection and Measurements; as well as the State of Pennsylvania and the Union of Concerned Scientists. R., Vol. 5, Tab 80 at 3-4; NUREG-0662 (May, 1980) Vol. II, Tab 1, 5, 6, 7, 8, 9, 10 and 13. Each of these organizations or authorities agreed with the conclusion reached in the draft environmental assessment that the physical health impact on the public from purging would be negligible. R., Vol. 5, Tab 69 at 9-1 to 9-7.

tamination alternatives would have negligible impact on the public health and that "the preferred method for removing the krypton-85 from the reactor building" was by purging, *i.e.*, by controlled venting to the outside atmosphere. J.A. 88.

The Commission reviewed the final environmental assessment at two public meetings and at one meeting with the Advisory Committee on Reactor Safeguards ("ACRS"), a prestigious independent panel charged by statute with reviewing Commission licensing actions for their potential safety implications. *See,* 42 U.S.C. §2039; *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526 (1978); R., Vol. 5, Tab 80, 82, 83. These deliberations resulted in unanimous agreement that purging the TMI-2 reactor containment building atmosphere was the best way of eliminating the krypton-85 and that the health and environmental impacts from purging would be negligible.

The Commission then entered the two Orders at issue on June 12, 1980. One, entitled "Memorandum and Order", authorized the public utilities to "conduct a purging of the TMI-2 containment, commencing no sooner than 10 days from the date of this order, in accordance with the proposal recommended by the NRC Staff as presented to the Commission in the record for the proceeding." Utilities' Pet., App. E at 59a. The other Order, entitled "Order For Temporary Modification of License", made a temporary modification to the TMI-2 license to permit purging to occur at a faster rate than the license then allowed, but without increasing the total radioactive dose to the public permitted by the plant's license. Utilities' Pet., App. D at 45a-49a.

A hearing was not held on either Order prior to its issuance. The Commission believed that the Memorandum and Order was not a license amendment subject to the notice and hearing provisions of Section 189(a).[2] The Order for Tem-

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[2] The Commission believed that this Order authorizing purging simply restored pre-existing license authority that had been sus-

porary Modification of License was treated as a license amendment. That Order included an express finding that the license amendment it authorized presented "no significant hazards consideration" within the meaning of Section 189(a) of the Act. Utilities' Pet., App. D at 47a. The Order was made effective immediately. It provided that a hearing could be sought within 30 days by any party whose interest might be affected by it. The Order further provided that a request for a hearing would not stay its effectiveness. *Id.* at 48a.

On June 23, 1980, respondents People Against Nuclear Energy ("PANE") and Steven C. Sholly ("Sholly") filed a motion with the Commission asking it to reconsider its June 12, 1980 Orders. On the same day, Sholly and respondent Donald E. Hossler ("Hossler"), president of PANE, filed a petition for review of the two Orders with the United States Court of Appeals for the District of Columbia Circuit. Their petition sought to suspend the effectiveness of the Orders and further sought a declaratory judgment that amendments to the TMI-2 operating license required notice and a prior hearing. Respondents then filed a flurry of motions and petitions with the Courts of Appeals for the District of Columbia Circuit and the Third Circuit, seeking to enjoin the scheduled purging of the TMI-2 reactor containment building.[3] All motions for

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pended in the aftermath of the accident and was, therefore, not a license amendment. Utilities' Pet., App. D at 58a-59a. Whether the Commission properly characterized the Order is not at issue in this appeal.

[3] On June 26, 1980, the Court of Appeals for the District of Columbia Circuit denied Sholly and Hossler's motions for injunctive, declaratory and other temporary relief. Also, on June 26, 1980, the Commission denied respondents' motion for reconsideration of its June 12, 1980 Orders, J.A. 55. On June 27, 1980, the day before venting was to commence, Sholly and Hossler filed with the Commission a "Formal Demand for an Adjudicatory Hearing Prior to Venting Gas From Three Mile Island Unit 2." Intervenor-Respondents' Appendix filed with the Court of Appeals ("I.R. App."), at 190-99. Their demand was referred to an Atomic

injunctive relief were denied, and the actions in the two Circuits were consolidated in the District of Columbia Circuit.

Purging at TMI-2 began on June 28 and was completed on July 11, 1980. It resulted in lower off-site radioactive doses than anticipated, well within all permissible dose guidelines set forth in applicable Commission regulations, the requirements of the June 12 Orders and the limits set in the TMI-2 operating license. Supplemental Affidavit of Michael P. Morrell, dated August 15, 1980, Appendix B to "Brief for Intervenor-Respondents" in the Court of Appeals, paras. 6-9.

The consolidated review petitions went forward on respondents' request for a declaratory judgment that the Commission had deprived them of their statutory right to notice and a prior hearing on the TMI-2 license amendment and the Order authorizing purging. On November 19, 1980, a panel of the Court of Appeals for the District of Columbia Circuit held that the fourth sentence of Section 189(a) of the Act authorizes the Commission to omit prior *notice* of a proposed license amendment based upon a finding that the amendment presents "no significant hazards consideration," but that even where the Commission properly omits notice, it nevertheless is required to hold a prior "*hearing* on license amendments whenever interested parties request one." Utilities' Pet., App. C at 44a (emphasis added).

The Court concluded *sua sponte* that respondents' "continued interest in — and oposition to — the actions of the

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Safety and Licensing Board for a hearing. A prehearing conference was held by the Licensing Board on July 7 and 8, 1980, at which time Sholly appeared and voluntarily withdrew his motion and his request for a hearing on the purging orders. I.R. App. at 211-216. On July 8, 1980, PANE filed two actions in the Third Circuit Court of Appeals (Docket Nos. 80-1994 and 80-1995). These actions made the same allegations and sought the same relief already denied by the Commission and the Court of Appeals for the District of Columbia Circuit.

NRC at TMI-2 clearly constituted a request for a hearing", apparently because respondents had shown "continued interest in — and opposition to — the actions of the NRC at TMI-2" and "were among the many" (over 800 individuals and organizations) that submitted comments on the draft environmental assessment. Utilities' Pet., App. C at 39a, n.25. Therefore, under the court's view of the statute, the Commission was required to hold a hearing *prior* to making the Orders effective.[4]

Petitions for rehearing by the public utilities and the Commission and the public utilities' suggestion for rehearing *en banc* were denied by the Court of Appeals on March 4, 1981. Utilities' Pet., App. A at 2a and App. B at 19a. Four judges dissented from the denial of the public utilities' suggestion for rehearing *en banc* and filed a 15 page "Statement On Denial of Rehearing En Banc." Utilities' Pet., App. A at 3a-17a.

The Court of Appeals has stayed its mandate pending final disposition of this case.

SUMMARY OF THE ARGUMENT

1. A fair, contextual reading of Section 189(a) of the Atomic Energy Act shows that a prior hearing on a proposed amendment to a nuclear power plant's operating license is not required if the Commission determines that the amendment presents "no significant hazards consideration." This reading is compelled by the legislative history of the Act and the purposes sought to be served by the 1962 Amendments adding the no significant hazards consideration language at issue.

One of these purposes was to relieve the Commission of the necessity of holding a hearing every time an operating license for a commercial power reactor was amended. The

[4] The Court ruled that the Memorandum and Order authorizing purging was a license amendment (even though not labeled as such by the Commission) and was therefore also subject to the hearing upon request requirements of Section 189(a). Utilities' Pet., App. C at 41a-43a.

Commission's interpretation of Section 189(a) prior to the 1962 Amendments had resulted in numerous, time-consuming hearings, even for trivial license amendments, thereby creating the potential for an operational crisis within the agency as its workload increased.

The Commission had begun to deal with the problem administratively in late 1960, by approving a procedure in the *Vallecitos* proceeding whereby, if the Commission staff determined that a proposed amendment to an operating license presented "no significant new hazards consideration", it could authorize the amendment *without notice or a prior hearing*. The *Vallecitos* approach was brought to the attention of Congress in hearings held in 1961 and 1962 as well as in a Congressional study of the Commission regulatory process. The *Vallecitos* procedure was turned into AEC Regulation 50.59 in early 1962.

Against this backdrop, Congress passed the 1962 Amendments to the Atomic Energy Act, including the addition of a fourth sentence to Section 189(a). The fourth sentence was intended to adopt legislatively the no significant hazards consideration approach "presently being applied by the Commission under the terms of AEC Regulation 50.59." The legislative history is therefore clear that Congress intended to embrace the Commission's approach in *Vallecitos* and AEC Regulation 50.59 by adding the fourth sentence to Section 189(a).

The Court of Appeals ignored this legislative history and held that Section 189(a) waived the hearing requirements only for *non-contested* license amendments, although the notice requirements were waived whenever a "no significant hazards consideration" determination was made. The Court's interpretation creates a paradox (which the Court recognized) in giving interested parties an unlimited right to a prior hearing on a proposed license amendment without giving them the right to receive notice of the proposed action. The Court of Appeals' construction of Section 189(a) contravenes funda-

mental rules of statutory interpretation, frustrates the statute's purpose, and is inconsistent with the requirements of the Administrative Procedure Act and with fundamental notions of due process.

2. In the nineteen years since Section 189(a) was amended, the Commission has consistently interpreted the Act as authorizing it to dispense with prior notice and opportunity for a hearing on license amendments involving no significant safety issues. This interpretation, first expressed in *Vallecitos* and AEC Regulation 50.59, was reaffirmed in regulations issued by the Commission after the adoption of the 1962 Amendments and has been applied thousands of times (over 1500 times in the last four years alone) to approve license amendments lacking safety significance without notice or opportunity for a hearing. This consistent, long-standing interpretation by an agency of its governing statute should be given great weight by a reviewing court, particularly in the field of regulating nuclear energy where Congress has delegated broad authority to the Commission. *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 367 U.S. 396 (1961). In summarily dismissing the Commission's intrepretation, the Court of Appeals ignored the purposes and policies underlining that interpretation and judicially imposed a new administrative requirement which seriously threatens to overwhelm the existing machinery for regulating nuclear energy.

Most license amendments which involve no significant hazards consideration are either neutral from a safety standpoint or actually improve safety. Yet, failure to issue such an amendment in a timely manner could cause an operating reactor to shut down or prevent it from returning to power. If prior hearings were required on license amendments presenting no significant safety issues, a delay of nine months or more on the issuance of many of the amendments would almost inevitably ensue, causing extensive plant shutdowns. There is no potential enhancement of public safety that outweighs the substantial detrimental effects of these shutdowns.

Amendments to operating licenses for commercial power reactors are made quite frequently, due to the very detailed procedures and requirements included in the licenses and the fact that any change in a plant's technical specifications requires a license amendment. Thus, if hearings were to be held upon request on license amendments without safety significance, the Commission's licensing machinery would, at the very least, be greatly encumbered and the Commission would have to divert its resources away from more important safety matters to accommodate such hearings.

The serious adverse consequences of the Court of Appeals' construction, without compensating benefits, requires that it be rejected, since a statute is to be read in a way that avoids oppressive results and permits an agency to fulfill its mandate unimpeded. *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 215 (1980).

ARGUMENT

I. The Language Of Section 189(a) Read In Light Of Its Legislative History Establishes That Congress Intended To Authorize The Commission To Amend A Nuclear Power Plant License Without A Prior Hearing If The Commission Determined That The Amendment Involves No Significant Hazards Consideration

1. Section 189(a) of the Atomic Energy Act divides licensing actions for nuclear power reactors into three categories: (1) construction permits, which require a mandatory hearing after thirty days notice and publication in the *Federal Register* (second sentence); (2) operating licenses or amendments to construction permits or operating licenses involving significant safety issues, which do not require a prior hearing if none is requested after thirty days notice and publication, but which do require a hearing if one is requested by an interested party (first and third sentence); and (3) amendments to construction permits or operating licenses where the Commission has made

a determination that the amendment "involves no significant hazards consideration", which require neither notice nor a prior hearing (fourth sentence).[5] This construction, though not free from ambiguity if based solely on the language of Section 189(a), is inescapable when the statute is read in light of its legislative history, particularly the purpose sought to be served by the amendment which added the "no significant hazards consideration" language at issue here.

Section 189(a) reached its present form in the 1962 Amendments to the Act, Pub. L. 87-615, 76 Stat. 409 (1962). As first enacted in 1954, Pub. L. 83-703, 68 Stat. 919 (1954), Section 189(a) contained only the first sentence of what is now the text of that provision.[6]

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[5] Section 189(a) reads in relevant part:

> In any proceeding under this Chapter, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

[6] There is no indication that we have been able to find in the legislative history of the 1954 Act that remotely suggests that Congress intended to provide a forum in which interested parties might raise health and safety issues. The notice and hearing provisions of the Atomic Energy Act of 1954 were designed to assure all interested parties an opportunity to compete for licenses to construct and operate a nuclear power facility. 100 Cong. Rec. 10405 (1954),

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Utilization of this procedure in
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criticism in Congress.[7] Members of

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Energy Act of 1954 at 3073, 3238-39, 3

[7] Several factors contributed to Congr
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Regulatory Process, Vol. I at 27-30, Vo

Atomic Energy expressed the view that a public hearing should be held by the Commission on all applications for licenses to construct nuclear power reactors. Improving the Regulatory Process, Vol. II at 449. The result of this concern was the passage of the 1957 Amendments to the Act, which added a second sentence to Section 189(a), and established mandatory public hearings for both the construction permit and the operating license of a nuclear power reactor. Pub. L. 85-256, 71 Stat. 576 (1957).[8] *See,* Improving The Regulatory Process, Vol. I at 7. Unlike the 1954 Act, the legislative history of the 1957 Amendments makes it clear that Congress' primary concern was to ensure that the Commission's regulatory framework "would guarantee the most careful, impartial review of safety questions." Improving The Regulatory Process, Vol. II at 578 (Letter of Commissioner Olson). Congress felt that mandatory public hearings at the construction permit and operating license stages would "protect the health and safety of the public in the future as more reactors are constructed and operated throughout our country." Statement by Senator Anderson, March 21, 1957, on Bill to Establish Reactor Safeguards Committee and Require Public Reports and Public Hearings, *reprinted in* "Government Indemnity and Reactor Safety" Hearings Before the Joint Committe on Atomic Energy, 85th Congress, 1st Sess. (1957). There was, however, no discussion of license *amendments* in the legislative history of the 1957 Amendments to the Act.

The Commission interpreted the 1957 Amendments to require it to give notice and to hold a hearing *every time* a licensing action was taken, including every amendment to construction permits and operating licenses. Radiation Hearing at 260-261 (Testimony of Mr. Price); 303-304 (Testimony of

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[8] The second sentence of §189(a), as added in 1957, read:

> The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register on each application under section 103 or 104b for a license for a facility, and on any application under section 104c for a license for a testing facility.

Commissioner Olson). *See also,* AEC Regulatory Problems: Hearings Before Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. at 6 (1962) ("AEC Regulatory Hearing"), (Testimony of Commissioner Olson). This interpretation of the Act created "an extraordinary procedural requirement" for the Commission. Radiation Hearing at 308 (Testimony of Commissioner Graham). The Commission found itself involved in an inordinate number of time-consuming hearings even for trivial amendments, to the detriment of both applicants and the Commission itself. *See,* Improving The Regulatory Process, Vol. II at 487-489.[9]

Both Congress and the Commission came to regard this situation as disturbing. The Joint Committee on Atomic Energy asked its staff to review the Commission's regulatory process. The result was a study entitled "Improving the AEC Regulatory Process", in which the Joint Committee staff criticized the Commission's practice of holding hearings on all licensing actions:

> [T]he Commission has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures. The intent of the 1957 staff report was that AEC *safety proceedings* should be public and on the record. It would appear that the Commission has utilized the hearing process to extend the Commission's affirmative control over

[9] As Commissioner Olson illustrated, "the technical specifications often covered even the color of outbuildings, and in order to change them we had to go through the same process [of hearings]." AEC Regulatory Hearing at 7. A classic example of the regulatory quagmire created by the Commission's interpretation of the 1957 amendments was the *Yankee Atomic Electric Co.* operating license proceeding in which, after a half dozen hearings and at least nine ACRS reviews, the hearing examiner ordered a further ACRS review and a hearing on two subsequent license amendments, even though the amendments were minor in nature and would actually increase the safety of the reactor. *See,* Improving the Regulatory Process, Vol. I at 37-39.

> licensing to include startup operations and changes. While such control may be desirable, *it might be accomplished without unnecessary hearings, but on the public record, with a later opportunity for hearing* in the event of exceptions filed by any party or intervention.

Improving the Regulatory Process, Vol. I at viii (Letter of Transmittal, emphasis added.) The study concluded that the inadequacies in the Commission licensing procedures might well lead to its being unable to discharge its functions:

> These problems, and the others identified in Part IV of this study, have not as yet become critical because the AEC's workload and the peaceful uses of atomic energy have not progressed to the point where cumbersome organization and procedures produce an operational crisis or inadequate protection for the public. However, there is every indication that as the Commission's regulatory workload increases, it will be unable to successfully meet its many-sided responsibilities for the regulation and development of atomic energy.

Improving the Regulatory Process, Vol. I at 4.[10] In the staff's view, this was a situation that demanded corrective action by the Commission as well as by legislation. *Id.*

Meanwhile, the Commission had begun to grapple with the problem on its own. In the *Vallecitos* proceeding, *General Electric Company* (Vallecitos Boiling Water Reactor), 1 AEC 541 (1960), it authorized a simplified procedure whereby a

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[10] As of the time the Joint Committee on Atomic Energy Staff study was written (March, 1961), there were only twelve power reactors which had received, or were applying for, construction permits or operating licenses. Improving the Regulatory Process, Vol. II at 171. By contrast, there are at the present time about seventy nuclear power reactors licensed for operation, not to mention those under construction or those for which application has been made for construction permits or operating licenses. Utilities' Pet., App. F at 62a. Clearly, the difficulties identified by the Staff, if created today "by cumbersome organization and procedures", would render the Commission "unable to successfully meet its many-sided responsibilities."

license amendment found by the Commission staff to present "no significant new hazards considerations" could be approved directly by the staff without prior notice or opportunity for a hearing. Copies of the "no significant new hazards consideration" finding and the amendment authorization were filed in the public record of the proceeding so that interested parties could file exceptions or seek judicial review. Improving the Regulatory Process, Vol. II at 485. This simplified procedure was promptly applied in other cases. *See,* Improving The Regulatory Process, Vol. I at 39. It clearly met the intent of the 1957 legislation that (1) ". . . AEC safety proceedings should be public and on the record"; (2) but "without unnecessary hearings . . . with a later opportunity for hearing in the event of exceptions filed by any party. . . ." Improving The Regulatory Process, Vol. I at viii.

The Joint Committee study on improving the AEC regulatory process endorsed the *Vallecitos* approach, and noted that "[t]he handling of *changes* would be facilitated if the Commission's recent order in the *Vallecitos* case, could be broadened by statute or regulation to a general rule." Improving the Regulatory Process, Vol. I at 73, n.4 (emphasis added).

The Commission acted on this suggestion and promulgated AEC Regulation 50.59, which codified the practice adopted in the *Vallecitos* proceeding. 27 Fed. Reg. 5491, 5492-5493 (1962), J.A. 20, 23-26.[11] Under AEC Regulation

[11] AEC Regulation 50.59 read, in relevant part:

* * *

(e) With respect to request . . . for changes in technical specifications for a facility of a type described in §50.21(b) or §50.22, or a testing facility:

* * *

(2) If the Commission determines that the proposed change . . . does not present significant hazards considerations not described or implicit in the hazards summary report, it *may authorize such change* . . . without referral to the Advisory Committee on Reactor Safeguards for a

50.59, if the Commission staff found that a proposed amendment to a facility's license did not present significant hazards considerations, it could authorize the amendment without notice and *without a prior hearing*. On the other hand, if the staff found that the proposed change presented significant hazards considerations, the change had to be referred to the ACRS and the Commission had to order a public hearing.

In drafting the 1962 Amendments to Section 189(a), the Joint Committee on Atomic Energy was well aware of the problems raised by the Commission's post-1957 expansive reading of the hearing requirement as well as the Commission's administrative efforts to mitigate those problems through the *Vallecitos* procedure for handling license amendments. These matters were brought to the Joint Committee's attention from a variety of sources. They were reviewed in a detailed analysis of the Commission's regulatory process undertaken in 1961 by the University of Michigan Law School. *See,* Improving the Regulatory Process, Vol. II at 431-432, 464, 484-496. The *Vallecitos* approach was discussed extensively and endorsed by the Joint Committee's staff in its own study on which the 1962 amendments were founded. *See,* Improving the Regulatory Process, Vol. I at 35-37, 49-50, 73 at n.4. The *Vallecitos* approach was explained by Commissioner Olson in a letter responding to a series of inquiries from the Executive Director of the Joint Committee. *See,* Improving the Regulatory Process, Vol. II at 578-582. The success of the approach was also referred to by Mr. Olson in his testimony at the Joint Committee hearing on the proposed

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report and *without a prior public hearing,* upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. J.A. 25, emphasis added.

The "Statement of Considerations" accompanying the new rule explained that 50.59 was based upon the procedure instituted in *Vallecitos.* J.A. 20.

amendments to the Act. *See,* AEC Regulatory Hearings at 6-7.[12]

Most importantly, the Joint Committee's final report on the bill that enacted the 1962 Amendments expressly adopted the *Vallecitos* approach as embodied in AEC Regulation 50.59:

> Accordingly, this section [Section 189(a)] will eliminate the requirement for a mandatory hearing except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or is-

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[12] The following exchange aptly summarizes the Commission's experience with the *Vallecitos* approach, as conveyed by Commissioner Olson to the members of the Joint Committee:

(Q) [Senator Pastore]: ". . . What has been the experience of the Commission under the rule of the *Vallecitos* case?"

(A) [Commissioner Olson]: "I feel that the course that we chose in the *Vallecitos* case of allowing the Division of Licensing and Regulation to make a determination as to whether an unreviewed safety issue was involved has cut cut nine-tenths of the hearings. There is no question but what in our eagerness to give full compliance to the law, as we found it on the books, that we painted ourselves into a corner. We were holding more hearings than we could handle. It was not because we wanted to. It was because we thought we were obliged to under the law. I think as a result of the understanding that was reached after our hearings last year in which we found it was the will of the committee — that their intent with respect to the amendment that they had put into the law — was that they did not quite share our literal interpretation of it. I think we arrived at a very workable result. I think it has really taken the bottleneck out of our hearing process. We were holding hearings on every change — the technical specifications included entirely too many things — and I think that the changes that resulted from the *Vallecitos* case have been extremely helpful to everybody." AEC Regulatory Hearing at 6-7.

> suance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

S. Rep. No. 1677, 87th Cong., 2d Sess. 7-8 (1962), *reprinted in* [1962] *U.S. Code Cong. & Ad. News* 2207, 2214 (emphasis added).[13] It bears repetition here that AEC Regulation 50.59 expressly provided in subsection (e)(2) that if a proposed license amendment did not present significant hazards considerations, the Commission was authorized to make the change "*without a prior public hearing.*"

It is thus abundantly clear that the 1962 Amendments were intended by Congress to vest discretion in the Commission to dispense with notice and opportunity for a hearing on proposed license amendments where the amendments had no significant safety implications. Congressional action in 1962 was directed at eliminating hearings where the license amendment was so trivial from a health and safety viewpoint that it did not merit a hearing. Improving the Regulatory Process, Vol. I at 52. Whether a hearing had been requested was irrelevant to the determination of whether a hearing was necessary.[14] The procedure selected by the Commission and

[13] This Court has noted "the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme" and has held that the Committee's actions demand "particular weight" in assessing legislative history. *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers AFL-CIO*, 367 U.S. 396, 408-09 (1961).

[14] As Professor David Cavers of the Harvard Law School testified before the Joint Committee:

> . . .[W]hether there has been a contest or not has practically no bearing on whether the reactor design is safe or risky. A contest initiated by an intervenor may merely throw light on the political situation in the State or district where the reactor is located. . .

AEC Regulatory Hearing at 41. *See also, id.* at 45.

Congress did not compromise the rights of the public because an interested party wishing to contest an amendment adopted without notice or a hearing under a "no significant hazards consideration" determination was protected by notice of the amendment's approval in the *Federal Register* and the opportunity to seek a subsequent hearing on the amendment or judicial review. *See*, Improving the Regulatory Process, Vol. I at 49-50.[15]

2. The Court of Appeals below interpreted the 1962 Amendments to Section 189(a) as requiring the Commission to hold a prior hearing on a license amendment whenever such a hearing is requested by an interested person. This interpretation reverts, for all practical purposes, to the pre-*Vallecitos* situation and makes it irrelevant whether the Commission has found that the amendment has no safety significance.[16]

The Court of Appeals below interpreted the 1962 Amendments as authorizing the Commission to dispense with a hearing *only* in *uncontested* cases. Utilities' Pet., App. C at 36a. That was the rationale for the *third* sentence of Section 189(a). S. Rep. No. 1677, 87th Cong., 2d Sess. 7-8 (1962). However, the *fourth* sentence of Section 189(a), which is the one at issue here, necessarily encompasses *contested* cases.[17] If

[15] A party who believes that he is threatened with immediate, irreparable injury by a "no significant hazards" license amendment is not without a remedy. He can seek *pendente lite* relief from a court of appeals, as respondents did here, pursuant to 28 U.S.C. §§2349(b) and 1651(a).

[16] The court below implicitly assumed that the "no significant hazards consideration" finding by the Commission regarding the Order for Temporary Modification of License was correct. Utilities' Pet., App. C at 33a-34a.

[17] While it is true that *as of 1962* most of the reactor licensing proceedings had been uncontested, at least one of them — the *PRDC* case — was hotly contested and led, after four years of litigation, to this Court's landmark decision in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396 (1961). The Joint Committee Staff's study of the Commission's regulatory process referred to the delay caused by intervention in the *PRDC* case, and recom-

all that Congress had intended in 1962 was to address uncontested license amendments, the third sentence of Section 189(a) would have accomplished that very result and there would be no need for the fourth sentence. By the same token, if Congress had intended that the Commission's obligation to hold a hearing on a license amendment turns on whether one is requested, it need not have distinguished between amendments presenting "no significant hazards consideration" and other amendments with potentially more serious safety significance, for the same hearing requirements would attach to either kind. Indeed, the only conceivable purpose of the fourth sentence of Section 189(a), as read by the Court of Appeals, would be to save thirty days — which would hardly justify an amendment to the statute.

It is a cardinal rule of statutory interpretation that all parts of a statute must be given effect, and judicial construction may not render a portion of a statute redundant or nugatory. *Watt* v. *State of Alaska*, 451 U.S. _____, 101 S.Ct. 1673, 1678 (1981); *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940). Here, the only logical reading of the statute, and the one that preserves its meaning and purpose, is that Congress saw a qualitative difference between amendments having no safety significance and other amendments — and the fourth sentence is based on that

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mended that "[p]rocedures which are reasonably expeditious . . . seem necessary if the risk of the paralyzing effects of contested cases is to be avoided." Improving the Regulatory Process, Vol. I at 56. *See also, id.* at 48. The same study went on to warn that "as the completion of a reactor draws near, each new hearing is conducted under the Damoclean sword of a new intervention which, as far as existing rules provide, may reopen issues previously considered at the construction permit stage or introduce new matter which, though unimpressive on scientific or engineering grounds, could not be disposed of by a hearing examiner until the full cycle of hearing, findings and order had been completed. A persistent intervenor could prolong the process still further by presenting exceptions requiring Commission action and even by seeking judicial review." *Id.* at 57.

qualitative distinction, not on the happenstance of whether a hearing is requested in a given instance. This interpretation is also consistent with decisions by this Court recognizing that even where a statute grants the right to interested persons to request a hearing on agency action, the agency still retains discretion not to hold the hearing where the action is below the threshold of significance. *See e.g., Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980); *Weinberger* v. *Hynson, Westcott and Dunning, Inc., supra*, 412 U.S. at 620; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

The Court of Appeals' strained reading of Section 189(a) acknowledges that the fourth sentence permits the Commission to dispense with notice of a proposed license amendment where the amendment presents "no significant hazards consideration." Utilities' Pet., App. C at 34a. However, in precisely the same circumstances, the Court of Appeals construed the Act as requiring a prior hearing on request. This obvious paradox was dismissed below as being no more than a paradox "in theory." Utilities' Pet., App. C at 35a, n.20. Yet, in the court's own words, "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice." *Id.* When construction of a federal statute would produce such an anomalous or absurd result, "it is to be avoided if at all possible." *Rector of Holy Trinity Church* v. *United States*, 143 U.S. 457, 461 (1892); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). Given the Court of Appeals' own admission, and in the absence of any compelling reason for its paradoxical reading of the statute, that reading should be rejected.

The effect of the decision below is to read Section 189(a) as affording an interested party the right to demand a prior hearing while simultaneously denying him the right to receive notice of the proposed action on which he is entitled to be

heard. Neither the Administrative Procedure Act, 5 U.S.C. §551 *et. seq.* ("APA"), nor fundamental notions of due process countenance such a result.[18] It is inconceivable that Congress, which incorporated the procedural safeguards afforded by the APA into the Act,[19] ever intended such an anomalous result. Rather, the intent to dispense with notice necessarily assumed the intent to dispense with a prior hearing where the proposed license amendment presents no significant hazards to public health and safety.

The legislative history of the 1962 Amendments indicates that Congress was aware of the futility of granting hearing rights if not accompanied by adequate notice. One of the

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[18] Under the APA, it is beyond dispute that, if a party is entitled to a hearing on proposed agency action, he is also entitled to receive adequate notice of that action. *See,* 5 U.S.C. §554(b); *North Alabama Express, Inc.* v. *United States*, 585 F.2d 783, 786 (5th Cir. 1978). Indeed, this notice requirement is fundamental to due process. *Schroeder* v. *City of New York*, 371 U.S. 208, 211-12 (1962). Notice of proposed action and opportunity for a hearing thereon cannot be disassociated. As this Court stated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the right to a hearing "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *See also, Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956) ("the right to a hearing is meaningless without notice"). The statutory construction of Section 189(a) offered by the Court below impermissibly uncouples these two basic concepts.

[19] Section 181 of the Atomic Energy Act, 42 U.S.C. §2231, states that "[t]he provisions of the Administrative Procedure Act shall apply to all agency action taken under this chapter, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act." The legislative history of the 1962 Amendments makes it clear that Congress intended the APA procedures to remain applicable to the licensing process established by the Amendments. *See* Senate Report No. 1677, 87th Cong., 2d Sess. 5-6, *reprinted in* [1962] U.S. Cong. & Admin. News at 2212-13.

criticisms leveled at the Commission hearing procedures was "[t]he failure to give reality to the right of intervention by providing adequate public notice of the safety questions to be considered at public hearings." Improving the Regulatory Process, Vol. I at 48; *see also, id.* at vii. Having made that criticism of the Commission's prior practice, Congress could not possibly have intended to grant a right to a hearing where it expressly withheld the right to receive notice.

3. The Court of Appeals cited certain portions of the legislative history of the 1962 Amendments to Section 189(a) to support its reading of the Act. Utilities' Pet., App. C at 36a-40a.[20] However, the legislative history excerpts quoted in the Court of Appeals' decision are either ambiguous,[21] taken

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[20] The Court of Appeals also cited its earlier decision in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924 (D.C. Cir. 1973), as holding that a prior hearing on a license amendment may not be denied if requested. *Brooks*, however, was a case dealing only with the Commission's obligation to give notice of a proposed amendment if it does not make a "no significant hazards consideration" determination and therefore is not relevant to the issue here. The Court of Appeals declined to follow a subsequent decision from the same circuit, *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (D.C. Cir. 1974) in which a different panel stated *twice*, after reviewing the legislative history of the 1962 Amendments to the Act, that a license amendment can be issued without opportunity for a hearing if the Commission determines that it involves no significant hazards consideration. 499 F.2d at 1078, text at n.22, and 1084, n.36.

[21] For example, identical statements on the floors of the House and Senate were made by the sponsors of the 1962 Amendments to the effect that the amendment to Section 189(a) "in no way limits the right of an interested party to intervene and request a hearing at some later stage." 108 Cong. Rec. 15746 (August 7, 1962) (remarks of Sen. Pastore); *id.* at 16548 (August 15, 1962) (remarks of Rep. Holifield). These general statements were interpreted by the Court of Appeals as inconsistent with the reading of the fourth sentence of Section 189(a) urged by the Commission and the public utilities. Utilities' Pet., App. C at 39a-40a. However, as the four dissenting

out of context[22], or are irrelevant to the issue of a right to a hearing on contested license amendments.[23] By contrast, the most relevant piece of legislative history, the reference in the

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Judges pointed out, the cited language can also be read as referring to the right to a hearing after the amendment has gone into effect. Utilities' Pet., App. A at 10a & n.6.

[22] For instance, the quoted statement from George F. Trowbridge is taken out of context. Utilities' Pet. App. A at 36a & n.21. In his testimony, Mr. Trowbridge was in fact advocating repeal of the mandatory hearing requirement for license amendments:

(Q) [Senator Anderson]: In discussing a possible revision of the law to limit hearing requirements to the initial construction permit, you especially note that hearing requirements should not extend to amendments to the permit.

What if the amendment involves a significant hazard, a consideration which had not been previously considered?

(A) [Mr. Trowbridge]: This is a possibility. Let me start with the premise that I do not advocate mandatory public hearings even on the initial construction permit. I am bound to say, however, that if they do any good, they are more likely to do good at the construction permit stage than any other.

I am bound to say, too, that they are likely to be less burdensome, less of a problem in timing, at the construction permit stage than any other. So I do not have a great deal of quarrel with those who advocate one mandatory hearing at the construction permit stage.

There can be amendments to construction permits that involve safety issues as important as the initial application. Mr. Price referred to that possibility this morning in his testimony. I think this will be the rare instance. Therefore, if there is a mandatory hearing requirement at the construction permit stage, *the problem of amendments needs to be left to the discretion of the AEC, because I know of no way of defining the kind of amendments on which AEC would thereafter have to hold hearings on and those on which it would not.* Radiation Hearing at 268 (Testimony of Mr. Trowbridge, emphasis added).

[23] For example, the testimony of Raoul Berger cited by the court did not discuss the conditions for waiving hearings in licensing

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Regulatory Hearing at 67-70.

> the Commission may hold a hearing after at least 30 days notice and publication once in the FEDERAL REGISTER or, in the absence of a request therefor by any person whose interest may be affected, may issue an operating license or an amendment to a construction permit or operating license without a hearing, upon 30 days notice and publication once in the FEDERAL REGISTER of its intent to do so. *If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, it may dispense with such notice and publication and may issue the amendment.*

10 C.F.R. §50.58(b) (1962) (emphasis added). This regulation is supplemented by Section 2.105(a)(3) of the Commission's Rules of Practice for Domestic Licensing Proceedings, 10 C.F.R. §2.105(a)(3)(1973), which in relevant part reads:

> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action with respect to an application for:
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> (3) An amendment of a license [for a facility] which involves a significant hazards consideration.

Under these regulations, which reflect the Commission's long standing interpretation of Section 189(a) of the Act, notice *is* required if a proposed amendment to a license "involves a significant hazards consideration". Otherwise, the Commission may dispense with such notice and publication and may issue the amendment immediately without a prior hearing, which was the procedure adopted by the Commission in this case.

This interpretation of Section 189(a) was again reiterated by the Commission in early 1980 (before the start of this litigation), when it issued proposed criteria for determining whether a license amendment involves "no significant hazards

consideration." In its Notice announcing the then proposed rule,[24] the Commission stated:

> Section 189a of the Act provides that, upon thirty days notice published in the FEDERAL REGISTER, the Commission may issue an operating license or an amendment to an operating license or an amendment to a construction permit for a facility licensed under section 103 or 104(b), or a testing facility licensed under section 104(c) without a public hearing if no hearing is requested by any interested person. However §189a permits the Commission to dispense with such thirty days notice and FEDERAL REGISTER publication with respect to the issuance of an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. In cases where the Commission determines that there is no significant hazards consideration, the Commission may issue the amendment and then publish a notice in the FEDERAL REGISTER. In such cases, interested members of the public who wish to object to the amendment and request a hearing may do so, *but a request for hearing does not, by itself, suspend the effectiveness of the amendment.*

45 Fed. Reg. 20491-20492 (March 28, 1980, emphasis added).

In the last twenty years, the Commission has consistently applied its interpretation of the Act thousands of times, including the present case, to make license amendments effective immediately without notice or opportunity for a prior hearing. In the last four years alone, the Commission has issued over 1500 license amendments using the same procedure followed here. See Utilities' Pet., App. F at 66a-76a. Thus, for example, in *Portland General Electric Company* (Trojan Nuclear Plant), Docket No. 50-344 (Order dated July 7, 1978, at 2), the Commission stated: "Section 189 does permit immediate effectiveness of operating license amendments upon a determination that the amendment involves no significant hazards consideration.' " Similarly, in *Consumers Power Company*

[24] The Court of Appeals noted that this proposed regulation was invalidated by its decision. Utilities' Pet., App. C at 40a, n.26.

(Big Rock Point Nuclear Plant), LBP-74-15, 7 AEC 297, 298 (1974), the Licensing Board considered whether a request for a hearing on a proposed amendment to the technical specifications of an operating license dictated that a hearing be held. The Licensing Board answered in the negative, stating:

> [T]he Board is convinced that . . . it was the clear intent of Congress and the Commission to afford opportunity for a hearing whenever the license amendment *per se* might give rise to "significant hazards considerations," but that it was not their intent to require such opportunity where the amendment did not give rise to such considerations.

It is well established that an agency's long-standing interpretation of its governing statute is to be given great weight by a reviewing court. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This principle is particularly applicable where, as here, the interpretation is contemporaneous with the enactment of the statute, is supported by the statutory language, and has been applied consistently by the agency in prior decisions. *E.E.O.C.* v. *Associated Dry Goods Corp.*, 459 U.S. _____, 101 S.Ct. 817, 823 n.17 (1981); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). In the field of nuclear energy regulation, this principle has been applied time and again to uphold a reasonable construction by the Commission of the Act and its own regulations promulgated thereunder. *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 14-15, (1975); *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961); *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 582 F.2d 166, 171 (2d Cir. 1978); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission*, 533 F.2d 655, 658-659 (D.C. Cir. 1976); *Nader* v. *Nuclear Regulatory Commission*, 513 F.2d 1045, 1055-56 (D.C. Cir.

1975). Application of this principle seems particularly appropriate in this instance, for the agency is exercising the primary function delegated to it by Congress: determining what actions are required to protect the public health and safety.

2. The Court of Appeals' disregard for the Commission's interpretation of Section 189(a) was not only erroneous under established legal principles, but was also based on a misperception by the Court of the Commission's licensing practices and the grave practical consequences of abandoning the procedure that has heretofore been followed by the Commission in reviewing license amendment applications.

Amendments to operating licenses play an integral role in the Commission's regulatory program for all licensed power reactors. Operating license amendments are extremely numerous. At the time our certiorari petition was filed, there were about eight hundred license amendment actions pending. Utilities' Pet., App. F at 62a. The need for this large number of amendments arises from the extremely detailed and extensive procedures and requirements included in the operating license. *Id.* at 61a-62a.

As part of its review of license amendment applications, the Commission staff determines whether the amendment involves "no significant hazards consideration." Changes falling into that category involve both changes which are essentially neutral from a safety standpoint, as well as changes which are believed to improve safety. Utilities' Pet., App. F at 62a-63a. Of the hundreds of license amendment applications pending at any one time, many would be determined to present no significant hazards consideration. In the last four calendar years, the Commission has published in the *Federal Register* notices of *more than 1500 license amendments* which it has found to involve no significant hazards consideration. *Id.*

Failure to issue a license amendment in a timely manner could result in an operating reactor being shut down or in a reactor temporarily shut down (*e.g.*, for refueling or main-

tenance) being prohibited from returning to power. Utilities' Pet., App. F at 63a-64a. At the time our certiorari petition was filed, there were pending license amendment applications for approximately fifty plants which were likely to be characterized as having no significant hazards consideration, yet which could cause plant shutdown if not issued within a few months. *Id.*

If hearings are required on a license amendment, a delay of at least nine months in its issuance is almost inevitable. Utilities' Pet., App. F at 64a-65a. The adjudicatory procedures available under Commission rules, the time needed for the hearing itself, and the decisionmaking process make it unlikely that a hearing could be completed in less than that time. *Id.* As a result, license amendments already pending before the Commission which involve no significant hazards consideration, and yet are needed to avoid plant shutdown, would not be issued in a timely manner if hearings are required before issuance. This result is not likely to change in the future. Under the Court of Appeals' holding, at any point in the operating life of a reactor, a person meeting minimum standing requirements can demand a prior hearing on even the most trivial amendment to the facility's license — thereby effectively throttling the plant in an endless series of hearings and administrative and judicial appeals.[25] Thus, imposition of a prior hearing requirement for trivial license amendments having no health or safety significance raises the very real specter of needless plant shutdowns.

The significance of these shutdowns will be dramatic. Replacement power costs for a typical nuclear plant alone will cost the licensee and consumers between $250,000 and

[25] This is particularly true in light of the Court of Appeals' holding that a person's "continued interest in — and opposition to — the actions of the NRC at [a nuclear power plant] clearly constitute a request for a hearing." Utilities' Pet., App. C at 39a, n.25. Therefore, if any person has expressed "interest in a proceeding", *every* license amendment issued in connection with that proceeding might have to be preceded by a hearing — a complete regression to the pre-1962 situation sought to be remedied by Congress.

$500,000 for every day a nuclear power plant is shut down. Utilities' Pet., App. F at 66a. In some areas of the country, particularly the Northeast, replacement power will be generated in large part from imported oil, about 30,000 barrels per day for a 1000 MWe nuclear plant. *Id.* These consequences are multiplied for every nuclear unit forced off-line as a result of the procedures which the Court of Appeals' decision would require.

The effects of the Court of Appeals' decision on the Commission would also be severe.[26] Since hundreds of no significant hazards consideration license amendments are issued every year, it would be surprising if a large number of hearings were not requested. The Commission Staff does not have the resources to handle a significant increase in the

[26] Only last term, this Court had to decide whether a lower court had interpreted correctly the "opportunity for a hearing" provision of §402(a)(1) of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1342(a)(1). *Costle* v. *Pacific Legal Foundation,* 445 U.S. 198 (1980). The Court noted that the standard applied below erroneously divested the Environmental Protection Agency of its necessary discretion and went on to note:

> Neither can we ignore the fact that under the standard applied by the Court of Appeals, the EPA would be required to hold hearings on most of the actions it takes with respect to NPDES permit issuances and modifications. Hearings would be required even in cases, such as this, in which the proposed action only extends a permit's expiration date without at all affecting the substantive conditions that had been considered during earlier hearings. The Administrator advises us that each year the EPA grants about 100 requests for adjudicatory hearings under the NPDES program, issues about 2,200 permits, and takes thousands of actions with respect to permits. Brief for Petitioner 34-35; see *United States Steel Corp.* v. *Train,* 556 F.2d 822, 834, n. 14 (CA7 1977). Affirmance of the Court of Appeals' rationale obviously would raise serious questions about the EPA's ability to administer the NPDES program. See *Weinberger,* 412 U.S., at 621; *E.I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 132-133 (1977).

445 U.S. at 215. The interpretation of Section 189(a) by the Court below in this case raises the same "serious questions" that concerned the Court in *Costle.*

number of hearings. Utilities' Pet., App. F at 65a. Hearings on no significant hazards consideration amendments would siphon away resources which are more properly devoted to significant safety matters. *Id.* The Commission is also likely to find it more difficult to impose license amendments which it believes are needed since it would be faced with the possibility of a hearing before the amendment could be made effective. *Id.* And licensees are likely to tend not to seek license amendments in order to avoid the risk of plant shutdowns. *Id.* While the Commission might resort to the increased use of rulemaking in an attempt to avoid the delay and resource misallocation of hearings on these matters, rulemaking would be less flexible than case-by-case amendments and would likely take even more time. These developments are all inconsistent with improving plant safety.

Finally, the vast majority of operating license amendments — and particularly those involving no significant hazards considerations — are reversible.[27] Changes such as shortened surveillance intervals can be lengthened; revised calculational techniques can be replaced with the prior methods. Utilities' Pet., App. F at 64a. With this in mind, the requirement in the Court of Appeals' decision that there be a prior hearing upon request loses virtually all its potential value to the public. Even in cases where "irreversible action" is involved, a subsequent hearing would still have the salutary effect of assuring thorough Commission consideration. Therefore, no measurable benefits are inherent in the Court of Appeals' sweeping decision that might offset its serious adverse consequences.

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[27] The TMI-2 license amendment authorizing krypton purging to proceed at a faster rate was irreversible because once released the krypton could not be reclaimed. Even in this exceptional case, the insignificant radioactive releases which actually resulted from the purging demonstrate that the Commission was correct in authorizing the TMI-2 license amendment without a prior hearing and further that the Court of Appeals was correct in refusing to enjoin the purging because respondents were not, in fact, threatened with "irreparable injury."

CONCLUSION

The Court of Appeals has dictated a radical change in nuclear energy regulation, a change that turns the Congressional scheme for licensing nuclear power plants on its head. The decision below severely impacts on the Commission's regulatory function to the decided detriment of the Commission, the utility industry and consumers of electricity, without discernible benefit to the public.

For the reasons stated above, the public utilities pray that this Court reverse the judgment of the Court of Appeals, and return implementation of the Atomic Energy Act to the Commission where it properly belongs.

Dated: July 31, 1981.

Respectfully submitted,

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Nos. 80-1640, 80-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY
AND
PENNSYLVANIA ELECTRIC COMPANY,
Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether § 189 of the Atomic Energy Act authorizes the NRC to deny to affected persons a duly requested hearing before giving effect to a license amendment which irreversibly impacts health and the environment but is summarily found by the NRC to involve "no significant hazards consideration."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1640
No. 80-1656

UNITED STATES NUCLEAR REGULATORY COMMISSION, *Et Al.*,

Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, *Et. Al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

People Against Nuclear Energy, Steven Sholly and Donald E. Hossler, respondents in 80-1640 and 80-1656 submit this brief on the merits in these consolidated cases.

OPINION BELOW

The decision of the Court of Appeals is reported at 651 F.2d 780. The denial of rehearing *en banc* and dissent therefrom appear at id. 792.[1]

STATUTE INVOLVED

THE ATOMIC ENERGY ACT, SECTION 189(a) ("§ 189"), provides in pertinent part as follows:

Sentence One; In any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any person as a party to such proceeding . . .

Sentence Two; The commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit . . .

Sentence Three; . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

Sentence Four; The commission may dispense with such thirty days' notice and publication with respect to any ap-

[1] The officially reported opinion differs in several material respects from that printed in the Petition for a Writ of Certiorari of the government ("Pet.") and in that of Metropolitan Edison *et al.* ("Met Ed").

plication for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. (Sentence enumeration added)

STATEMENT OF THE CASE

On March 28, 1979 the now-famous Three Mile Island nuclear power reactor accident began. Due to a partial meltdown of the reactor core of Three Mile Island Unit 2 ("TMI-2"), radioactive gas and radioactive particulate matter was released into the atmosphere. This release of radiation caused, among other things the evacuation of some of the local residents.

In addition to this release of radiation to the atmosphere, radioactive gases such as Krypton gas (Kr-85) accumulated in the crippled reactor's containment building, along with radioactive particulate matter such as Strontium-90, Plutonium-239 and Carbon-14. See NRC Staff Report, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", May, 1980, Record, Vol. V, Tab 69, p.3-1, line 6, ("NRC Final Assessment"); Institute for Energy and Environmental Research, Heidelberg, FRG, "Radiation Exposure Due to Venting TMI-2 Reactor Building Atmosphere", June 12, 1980, (Attachment B, Petition for Review of Final NRC Orders, No. 80-1691) p.4, ("Heidelberg Report"); *cf* J.A. 61.

These radionuclides were eventually ordered by the NRC to be released into the atmosphere, in two Orders from which these consolidated lawsuits arose. Respondents Sholly and Hossler petitioned for review of the NRC orders stating that law and regulation required *30*

days prior notice before these NRC orders could be made effective, since they both effected amendments to Metropolitan Edison's operating license, and since they both involved "significant hazards consideration". And in a second petition, People Against Nuclear Energy (PANE) stated that *hearings* on both NRC Orders were required under § 189 since both Orders effected license amendments and since a hearing had been requested by persons "whose interest may be affected by" the amendments.

The NRC opposed any notice or hearing on either of the two Orders. The NRC contended that the Order entitled "Memorandum and Order" was not subject to the § 189 notice and hearing requirements because it was not a license amendment. The NRC then claimed that both notice and a duly requested prior hearing could be waived on the "Order for Temporary Modification of License" ("Modification of License") because a summary finding of "no significant hazards consideration" had been made by the NRC. Pet. 49a, 62a.

The United States Court of Appeals for the District of Columbia rejected this reasoning. It found that a hearing had been duly requested and was required by law to be granted on both orders. Therefore, the Court of Appeals found it unnecessary to reach the question of whether 30 days' notice was required prior to effectuating the NRC orders. 651 F.2d 786, note 16. Therefore the Court of Appeals did not need to resolve the question of whether the NRC orders did involve "significant hazards consideration." The Court of Appeals held that the "Memorandum and Order" did effect a license amendment and accordingly a hearing should have been held on the matter of releasing radiation into the environment. The Court of Appeals also held that the hearing should have included the matter contained in the "Modification of License" since the Court

found nothing in the legislative history of § 189 to suggest that the plain language of the provision should be modified as to permit a waiver of hearing upon an NRC finding of "no significant hazards consideration." Moreover the Court found that the "administrative practice" offered by the NRC to support its interpretation of the statute was not unambiguous and in any event could not "avail to overcome a statute so plain in its commands as to leave nothing for construction." 651 F.2d 789, note 26, quoting *Norwegian Nitrogen Products Co.* v. *U.S.*, 288 U.S. 294, 315 & 1933). The Court of Appeals entered a declaratory judgment on both of these two holdings.

The Petitioners sought certiorari in this Court only on the second, and lesser, of the holdings, i.e. that § 189 does not authorize the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding.

The NRC Orders from which these consolidated cases arose followed a series of NRC actions. The first of these appeared about four months after the beginning of the Three Mile Island crises, when the NRC issued on July 20, 1979 an "Order for Modification of License", 44 Fed. Reg. 45271, which said the NRC was reviewing the TMI-2 operating license to see what license modifications were needed to "assure the continued maintenance of the current safe, stable, long-term cooling condition of the facility." It stated that "[t]his evaluation will be set out in a forthcoming Safety Evaluation which will address the imposition of new and/or revised Technical Specifications. It is expected that this effort will be completed in about 30 days at which time a further Order will be issued."

Pending a second Order the NRC suspended the "authority granted by the TMI-2 Operating License No. DPR-73 to operate Three Mile Island Nuclear Station,

Unit 2", but provided that the "licensee shall maintain the facility in a shutdown condition." Further, the NRC found that the "public health, safety and interest require that this suspension be effective immediately" and promised that the subsequent Order would state the time for requesting a public hearing "on this matter." Id.

A second Order imposing new or revised Technical Specifications and other license modifications was not forthcoming within the promised 30 days. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67738. This Statement announced the decision of the NRC to prepare a "programmatic environmental impact statement on the decontamination and disposal of radioactive wastes resulting from the March 28, 1979 accident" at TMI-2. J.A. 36 The Statement goes on to say that if the NRC decides it to be in the public interest to purge the containment building of radioactive gases before the "programmatic" EIS [Environmental Impact Statement] is complete "the Commission will consider CEQ [The Council on Environmental Quality]'s advice as to the Commission's NEPA [National Environmental Policy Act] responsibilities." CEQ's advice was that venting the radioactive gas prior to preparation of an Environmental Impact Statement would be inconsistant with NEPA. J.A. 83. The Statement concludes that with "the help of the public's comments on our proposals we intend to assure, pursuant to NEPA and the Atomic Energy Act, that the cleanup of TMI-2 is done consistently with the public health and safety, and with awareness of the choices ahead."

On February 11, 1980 the NRC issued its second "Order," 45 Fed. Reg. 11282, February 20, 1980. J.A. 39-45. This Order recognizes that

> in the present post accident status of the facility, the license itself does not include explicit provisions or technical specifications for assuring the continued maintenance of the plant in a safe, stable condition . . . [P]rovisions [concerning operation] are now simply inapplicable to the facility in its present post-accident condition. J.A. 40

Therefore, the Order modified the operating license to, among other things, "prohibit venting or purging or other treatment of the reactor building atmosphere" or other waste disposal until "approved by the NRC" in accordance with the November 21, 1979 Statement (44 Fed. Reg. 67738).

The second Order also proposed new "Appendix A" Technical Specifications as a formal amendment of the license which was not to take effect until after holding any requested hearing. (This Order did not change the license's Appendix B "Environmental Technical Specifications" which set maximum limits on effluent releases and discharges.) But paradoxically, the Appendix A changes were also made immediately effective by amendment of the July 20, 1979 Order for Modification of License, and the NRC stated that the operation of this amendment would not be stayed by a request for a hearing. The subject matter of any requested hearing was limited to: (a) the new Appendix A technical specifications; and (b) "whether the provisions of this Order would significantly affect the quality of the environment."

In response to this February 11, 1980 Order, hearings were requested by the Environmental Coalition on Nuclear Power, and by two individuals. See "Nuclear Accident and Recovery at Three Mile Island," S. Report, Subcommittee on Nuclear Regulation, June, 1980, Ser.

No. 96-14, 98th Cong. 2nd Sess. p. 208. One of these individuals was Respondent Steven Sholly. Hearings on this Order had still not been held by the time the venting occurred, on June 28, 1980.

On March 27, 1980, the NRC published a notice in the Federal Register on the "Availability of Environmental Assessment for Decontamination of Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed. Reg. 20265. This notice announced that a draft of an NRC staff report "recommends that the building atmosphere be decontaminated by purging to the environment" and that it concludes, based "on its estimate of doses to the public," that "this action does not constitute a significant environmental impact." This notice did not provide for any public hearings, although it did allow written comments if they were submitted by April 11, 1980 (i.e. within two weeks of the publication date of the notice). A later "Addendum 2" to this draft report was made available on April 2, 1980, 45 Fed. Reg. 21760, and again, written comments were allowed if they were submitted within two weeks, by April 17, 1980. Numerous people, including the Governor of Pennsylvania, Richard Thornburgh, criticised these short periods for public comment, since the NRC had taken an entire year in preparing its report, and since there had not been any general publicity about the staff report. As a consequence, the NRC published a notice entitled "Extension of Comment Periods," 45 Fed. Reg. 30760, May 9, 1980, which extended the comment period by one week from the publication of that notice, until May 16, 1980. See S.Rep., "Nuclear Accident," supra at 206.

After this, the NRC staff issued its report, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," NUREG-0662, May 1980 (Record, Vol. V, Tab 69). This

Final Assessment discussed several alternative methods for decontaminating the TMI-2 reactor building atmosphere. These methods included cryogenic processing (i.e. freezing) of the gas, gas compression, a fluorocarbon absorption process developed at Oak Ridge National Laboratory, and other processes which would remove the radioactive contaminants from the reactor containment building atmosphere for ultimate storage and isolation from the environment. Each of these methods presented alternatives which would meet in varying degrees the objective of maintaining "radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable", 10 CFR Section 20.1(c). The NRC staff also presented another alternative: to turn on the TMI-2 ventilation system so as to simply release the Krypton gas into the ambient air, along with all of the radioactive particulates that would pass through the system's filters with the gas. These radioactive materials would then be disseminated throughout the air and deposited on the land, including valuable farm property, near the plant, where they would remain as sources of radiation for periods determined by the half-lives of each radionuclide. The half-life of Kr-85 is over 10 years, that of Pu-239, for example, over 24,000 years. The venting, or "purge", alternative was clearly the cheapest of all the alternatives. It was this alternative that the NRC staff recommended for adoption by the Nuclear Regulatory Commission on the grounds that it was the one which could be executed most quickly.

No public hearings were ever held on the NRC staff recommendation, though written coments from the public and some interested parties were received. Some of these were included in Volume 2 of the NRC staff report. NUREG-0662. The Comments from the public over-

whelmingly opposed the purge alternative, as did an enraged public at a "meeting" held by the NRC on March 19, 1980. Record, Vol. IV, Tab 46, p. 16 and *passim;* J.A. 85.

On June 5, 1980, the five NRC Commissioners met to consider the staff report. Although the public could attend this meeting, there was no opportunity for any of the people who would be affected by the NRC staff recommenddation, or any other members of the public, to be heard. At this meeting a summary of a report prepared by the Institute for Energy and Environmental Research, of Heidelberg, FRG, was presented to Commissioner John F. Ahearne, Chairman of the Nuclear Regulatory Commission. This summary stated the conclusions of the Institute's final report, published on June 12, 1980, that the proposed venting could cause four additional cancer cases and an equivalent level of genetic damage. Heidelberg Report, pp. 6 and 13.

On June 12, 1980, the NRC issued the two final orders which gave rise to these consolidated lawsuits, authorizing the venting of radioactive materials into the environment as recommended by the NRC staff. The "Modification of License" provided that the "Environmental Technical Specifications," (Appendix B of the TMI-2 Operating License DPR-73, dated February 8, 1978) would be amended to suspend the detailed limitations on releases of radioactive materials contained in Section 2.1.2. Appendix B of the license titled "Gaseous Effluents". This affected portion of the license is intended to implement the "design objectives" set out in 10 CFR Part 50, App. I, § II (B & C) and 10 CFR Section 50.36a for operating reactors, which permit flexibility by allowing quarterly averaging of high releases into the environment so as to assure that "unusual operating conditions that temporarily result in releases

higher" than those normally allowed do not interfere with "a dependable source of power." 10 CFR Part 50, App I, § IV. The releases thus authorized by the NRC for the TMI-2 cleanup therefore exceeded even the amounts allowed for an *operating* reactor, even after allowing for unusual operating conditions. See Pet 64a note.

The "Modification of License" was made "effective immediately" (Pet 65a), and the venting of radioactive materials was authorized starting 10 days after June 12 (Pet. 58a). The "Modification of License" specifically stated that a request for a hearing would not stay its effectiveness (Pet. 66a) and officially stated its summary conclusion that the change in Appendix B of the Operating License "involves no significant hazards consideration" (Pet. 64a, 65a).

The reason given for the finding of "no significant hazards consideration" was not, however, a scientific or technical one, but rather a legal argument. The NRC did not contend that the releases would not exceed the approximately 1300 curies of Kr-85 monthly that the reactor would normally release while in operation, nor did the NRC contend that the releases would not exceed the approximately 100 curies of Kr-85 monthly that the reactor was releasing to the environment at that time. J.A.31. Nor did the NRC argue that the offsite doses of radiation to people in the Three Mile Island area would not increase with the purging – as indeed they did increase.

Instead, the NRC simply contended that these increased doses of radiation to the public would still fall "within the *limits that would apply if the reactor were operating normally*" (Pet. 64a, emphasis added). The NRC then concluded that since the doses resulting from venting would not exceed the *standards* for radiation *doses* applicable to an *operating* reactor and therefore would implement "the

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The "Modification of License" was intended to provide the NRC maximum flexibility in administering the venting operation so as to allow releases of even greater amounts of radiation to the environment than those already substantial amounts nominally allowed by the operating license. Since this required an explicit license amendment it was isolated in a separate order. Petitioners have mischaracterized the "Modification of License" as "replacing" limits on releases of radiation with "new limits expressed in terms of actual radiation dosages." U.S. Brief, pp. 3 & 6. However the limits on dosages were neither "new" nor did they relate to "actual" doses received by the people around Three Mile Island. The dosage limits provided by the Modification of License, Pet. 65a, – 15 mrem skin dose and 5 mrem total body dose – are the same as the limits provided by 10 CFR Part 50, App. I, § II.B(2)(b) for annual offsite doses that will be "deemed" to comply with the ALARA requirement for operating light water reactors. The additional provision that 20% of these limits should not be exceeded in any one hour period compares with the reporting requirement contained in id., § IV. A that attaches if half of these limits is exceeded in any one *quarter.* It is readily apparent that the dosage limits provided in the Modification of License are very little different than those already applicable to TMI-2 under Appendix I of Part 50. Accordingly the NRC did not "replace" the suspended release limits with "new" dosage limits, but rather left the old dose standards roughly the same, thereby leaving only half of the former protection against radiation in place. Similarly, the dose standards were not based on actual measurements of doses to real individuals but rather were based on hypothetical doses calculated from a limited number of sampling stations.

An independent team of scientists performed their own radiation sampling and measurements during the full course of the venting operation. These scientists tracked the "plume" of materials released from TMI-2 and placed their instruments at the point where the radioactive effluent reached ground level. J.A. 98-99. On the basis of their independent measurements these scientists calculated that 7 millicuries of Strontium-90 had been released — four million times the amount expected by the NRC. J.A. 102,104. These independent scientists calculated that this amount of Strontium-90 was sufficient to cause long term health effects of 50 to 300 additional fatal cancers as well as other genetic effects. J.A. 104. The people who will die from these cancers and who will suffer from genetic defects will have no recourse against petitioners for the damages done them solely for purposes of cutting the expense of the cleanup. The trail of causation from these injuries back to petitioners' action in June and July 1980 becomes lost in the myriad alternative causes of cancer and genetic defects. The hearing which the Court of Appeals below held to have been illegally denied was the only recourse available to the people exposed to these dangers.

The question of whether the hearing on the release of radiation from TMI-2 to the environment was illegally denied by the NRC is not before this Court. That question has not been appealed and therefore must be taken as settled. It was unlawful for the NRC to deny a public hearing on the decision to release radioactive materials from TMI-2. The narrow question before this Court is whether it was also unlawful for the NRC to refuse to include as part of such a hearing the matters addressed in the Modification of License, i.e. the suspension of the limits on release of radiation contained in the operating license.

SUMMARY OF ARGUMENT

Sentence One of § 189, which has been in effect since 1954, provides as follows:

> In any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . .

A 1962 amendment to § 189 made the following changes with respect to hearings on licensing actions under the Atomic Energy Act:

> Sentence Two – retained a mandatory hearing requirement for construction permits while eliminating mandatory (i.e. unrequested) hearings on other licensing actions such as license amendments;
>
> Sentence Three – provided that in the case where a hearing had not been requested such other licensing actions could be taken only after 30 days' prior notice and publication in the Federal Register;
>
> Sentence Four – excepted from this 30 days' prior notice and publication requirement those license amendments which the NRC finds to involve no significant hazards consideration.

Petitioners in this case attempt to read into Sentence Four language that Congress did not choose to write and even petitioners admit "189(a) does not expressly mention." U.S. Brief 14. Petitioners argue that Sentence Four might somehow be read to authorize the denial of a requested hearing. But the arguments offered for this im-

aginative reading of § 189 lack cogency, boiling down essentially to the non-sequitur assertion that to authorize waiver of notice and publication when a hearing has not been requested necessarily implies authority to deny a hearing when one has been requested. This ignores the fact that economy of prose if nothing else would lead a legislative draftsman intent on authorizing the denial of a requested hearing to simply say as much and thereby make any reference to notice and publication unnecessary. The ambiguity petitioners seek in § 189 as the essential foundation for their case is simply not to be found there.

Petitioners also fail to present a single example of legislative history or relevant administrative practice that is in any way inconsistent with the principle that a meaningful hearing must be held on request made at some time after the initial decision is issued on a "no significant hazards consideration" license amendment. Nor do petitioners cite any legislative history or administrative practice whatsoever even bearing on the principle embodied in the Court of Appeals' holding in this case that to be meaningful a hearing on an amendment involving irreversible action such as release of radiation into the environment must be held *prior* to final issuance and effectuation of the license amendment.

Petitioners seek to supplement a statutory construction argument riddled with empty reasoning, confusion and irrelevance by offering wholy disingenuous predictions about the dire consequences that the relatively infrequently invoked due process rights involved in this proceeding might speculatively have upon NRC administrative efficiency. The speculation that props up this policy argument is readily revealed to be as unreliable as petitioners' idiosyncratic approach to statutory construction.

The due process rights at stake – infrequently invoked as they may be – are nevertheless too important in the context of protection of the public against hazards of radiation to be so lightly revoked as by the judicial legislation sought by petitioners in this case. The unique and vast discretion already reposed in the NRC over matters that hazard grievous loss of life, liberty and property precludes the judicial erosion of the minimal due process rights accorded by a strict and faithful construction of the plain language of the statute by which Congress sought to structure otherwise unbounded agency discretion with procedural safeguards.

ARGUMENT

The resolution of this case will turn on the interpretation given by the Court to the fourth sentence of § 189 of the Atomic Energy Act. The fourth sentence of § 189 refers back to and can only be understood in reference to the third sentence of § 189 which provides that *in the absense of a request* for a hearing on certain licensing actions, a hearing may be omitted prior to issuance of the amendment, but only after a 30 days' notice and publication of the NRC's intent to so proceed without such an (unrequested) hearing. The fourth sentence goes on to provide that "such 30 days' notice and publication" may be dispensed with, in the case of amendments, "upon a determination by the Commission that the amendment involves no significant hazards consideration." It is this language which petitioners seek to turn into authority for denying *requested* hearings upon a finding of "no significant hazards consideration." Such authority would provide a powerful weapon in the hands of an agency seeking to conduct its affairs outside of public view. Strategic use of this weapon can effectively paralyze representatives of the public who would seek to contest controversial issues involving

nuclear safety by requiring them to litigate first in the Court of Appeals an ultimate question of fact on a barren record. Because of problems of timing, because a "court more often than not will decline to grant emergency relief," 651 F.2d 784 note 14, and because of the sheer expense of litigation for public interest plaintiffs who stand to make no financial gain from the litigation, even a victory in Court will typically be Pyrrhic – as it was in this case.

In order to craft such a weapon from the otherwise innocuous language of § 189 petitioners must of necessity prevail in persuading this Court, as it failed to persuade the Court of Appeals, of the following:

> 1. That the fourth sentence of § 189 contains some ambiguity which might allow an interpretation that the NRC has authority to deny a requested hearing on the basis of a "no significant hazards consideration" finding, and
>
> 2. Legislative history exists that indicates that Congress intended § 189 to authorize the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding, or
>
> 3. Consistent administrative practice interpreted § 189 to permit the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding.

In addition petitioners attempt to fashion a "public policy" argument in support of granting the NRC the authority it seeks to deny duly requested hearings.

The arguments offered by the petitioners in their briefs on these issues constitute an unbroken tissue of disingenuous assertion, speculation and non-sequitur. Each of these arguments is answered in turn below.

1. The Plain Meaning of § 189 Forbids Any Interpretation That a Duly Requested Hearing May Be Denied Upon a Summary Finding by the NRC That a License Amendment Involves No Significant Hazards Consideration.

In its brief presented to the Court of Appeals the United States gave a cogent exegesis of the plain meaning of § 189 (Justice Department Brief pp. 4-8, 12-4). In its brief before this Court the United States attempts to turn the tables to assert that the "plain language" of the statute supports the NRC's position. (U.S. Brief 38). The petitioners' "plain language" arguments are as weak here as the United States' arguments were strong below.

a) The principal argument relied upon by Met Ed and the NRC below was that since a right to hearing is not meaningful without an attendant right to notice, Congress' authority to waive notice must have carried with it an implicit waiver of the right to hearing. However, as the Court of Appeals found, this seeming "paradox" is theoretical only, it did not occur in this case, and it is unclear whether it would ever occur. First the notice required under 10 CFR 2.106 probably must be given before an issued amendment is effectuated so as to provide an opportunity for appeal. Second, and more important the Government in the Sunshine Act, 5 U.S.C. 552b (1976) provides that every meeting at which the Commissioners dispose of agency business must be open to public observation. Accordingly the interested public and the press have ample means to learn of decisions that might affect their interests. Even the repealed 10 CFR 50.59 so heavily relied upon by petitioners, in subsection(g) (J.A. 25-26) required that both the request for a license change and the authorization issued by the Commission must be made

part of the public record of the licensing proceeding. Again any persons following the proceedings would have actual notice of the licensing action.

Both briefs of petitioners cite the case of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) for the proposition that a right of hearing without notice is meaningless. U.S. Brief 38; Met Ed Brief 24 note 18. But both briefs ignore the type of notice that is being waived under § 189, i.e. publication in the Federal Register. The significance of such notice was tellingly described, on the very next page of text in Mullane from that cited by petitioners, as follows.

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . [Compared to] actual notice we are unable to regard this as more than a feint . . . . Chance alone brings to the attention . . . an advertisement in . . . a newspaper. Id. 315 (sentence order modified).

Persons having the economic and scientific resources required for participation in a hearing on a license amendment would not likely find out about the amendment by casual perusal of the Federal Register. It is far more likely that they would be monitoring the proceedings by which they are affected and learn about the amendment directly or indirectly from the public record. The purpose and effect of sentence four is to save 30 days of administrative time on each of the overwhelming number of amendments where it can be reasonably expected that no hearing will be requested, i.e. whereof the NRC fairly determines there to be "no significant hazards consideration." Given petitioners' estimate of about 400 "no significant hazards con-

sideration" amendments a year, this technique saves about 12,000 days of administrative time annually. The due process cost of so expediting the overall administrative licensing process is that any affected party seeking a hearing on an irreversible action has the burden of requesting a hearing promptly before the issued amendment is given effect.

The compromise struck by the fourth sentence of § 189 between administrative efficiency and administrative due process has apparently been an eminently workable one. In the 19 years since this provision was enacted only one other dispute involving the provision has reached the courts, *Brooks* v. *AEC,* 476 F.2d 924 (1973). Both in *Brooks* and in the instant case the cause of the dispute over the fourth sentence of § 189 was generated less by any ambiguity in the provision itself than by the NRC's attempt to cover more serious violations of other provisions of § 189 that were coupled with the NRC's violation of this provision.

b) The other argument offered by petitioners in hopes of reading some ambiguity into § 189 is based on a non-sequitur. The government's brief at 36, the last two sentences, states correctly that the words "such thirty days' notice and publication" in the fourth sentence refers back to the notice and publication required when the NRC intends to issue a license amendment without a hearing. This action is of course by the very terms of sentence three only permitted "in the absence of a request" for a hearing. However, petitioners conclude, in what must be a minor classic of illogic, that if the NRC is allowed, upon making a no significant hazards consideration finding, to dispense with the notice required when a hearing has been omitted because one has not been requested, "it necessarily follows that the Commission is in fact entitled to dispense with a

hearing". Ibid. The simple answer to this notion is that sentence three provides that a hearing may indeed be dispensed with when one has not been requested. Sentence four says nothing about and does not remotely suggest the possibility of dispensing with a hearing *that has been requested.* Its use of the words "such notice" makes it clear that sentence four is only a qualification of, and is therefore limited to the subject matter of, sentence three.

Petitioners attempt to explain away this obvious relationship between sentences three and four of § 189 in a string of non-sequiturs. U.S. Brief 36 note 30. First petitioners state that respondents' recognition of this relationship somehow conflicts with the interpretation of the Court of Appeals. But petitioners do not explain how they came to believe the Court of Appeals' view differed from that of the respondents. Several references are provided (id. 37 & note 31) suggesting that the Court of Appeals assumed the "sentence three" notice of NRC intent to issue a license amendment without a hearing would also be the first notice that a license amendment would issue at all. This identity between the two possible kinds of notice not only exists in fact, since the law nowhere requires any other published notice of the action prior to the notice required by sentence three, but it is also the very premise upon which petitioners argument discussed in 1(a) above is based. If some notice other than that required in sentence three were to be given by the NRC of the issusance of a license amendment, then there would be no basis whatsoever for the argument that waiver of "sentence three" notice implies waiver of hearing. However, in the argument of petitioners now under discussion a wholly disingenuous attempt is made to discover some error of indeterminate consequence in the Court of Appeals' decision by suggesting that the notice of action without a hearing is

somehow distinct from the notice of the action, without anywhere stating that there is any practical difference between the two. This attempt can only be understood as an effort to import the confusion and ambiguities of petitioners' own arguments into the statute.

Next (id. 37 note 30) petitioners seek to base a similarly confused argument on the use of the word "any" in the sentence four phrase that the "Commission may dispense with such thirty day notice and publication with respect to any application for an amendment . . ." It requires no elaborate argument to show that the word "any", just as the whole sentence, is qualified by the words "such notice" which in turn refer back to the waiver of hearing when one is not requested *per* sentence three. So again an attempt to find ambiguity through analysis of the words of the statute leads nowhere.

Next petitioners state that "respondents' suggestion fails to account for" the omission of the issuance of an operating license from the coverage of sentence four. (Id note 30.) The simple answer to this argument is that the omission accounts for itself. It is only too obvious that an operating license could never under any circumstances "involve no significant hazards consideration" and therefore there is no need to include operating licenses within the scope of sentence four.

Finally petitioners close out this pointless string of arguments on the plain meaning by repeating the ever-ready assertion that the legislative history of § 189 "adopts the Commission's practice under 10 CFR 50.59." Id. This assertion is irrelevant to a discussion of the plain meaning of § 189 and is dealt with below. Legislative history — even if it did support petitioners' interpretation, as 10 CFR 50.59 fails to do — could not create ambiguity in the text

of the statute. This exhausts the arguments proffered by petitioners to undermine the clear and plain meaning of sentence four. In their lack of persuasiveness, and even logic, these frivolous arguments only serve to reinforce the plain meaning which a simple reading of sentence four unambiguously conveys, i.e. that sentence four of § 189 pertains to notice and publication and has nothing remotely to do with authorizing the denial of a duly requested hearing on a license amendment.

2. The Legislative History of § 189 Lends No Support to the Notion That Congress Intended to Authorize the NRC to Deny a Duly Requested Hearing on the Basis of a "No Significant Hazards Consideration" Finding.

Petitioners devote the greatest portion of their argument to a discussion of legislative history. U.S. Brief 15-35. Although many fragments from the legislative record are quoted and discussed nothing is found to modify the conclusion of an exhaustive discussion of the legislative history of § 189, set forth in the brief of the United States before the Court of Appeals, explaining the view that § 189 does not authorize the NRC to deny a duly requested hearing:

> The legislative history of the 1962 amendment is the most compelling reason for our holding this view. Throughout the legislative history, at crucial points, are authoritative statements that the effect of the amendment would be only to eliminate hearings when none was requested. It was repeatedly said that the amendment would not affect the right of any person to obtain a hearing on request. Memorandum of Respondent United States of America 14;

In fact, as admitted by petitioners, the legislative history on sentence four of § 189 is sparse. U.S. Brief 34. Most of the discussion of legislative history presented by petitioners is simply padding in no way inconsistent with the conclusion of the United States quoted immediately above. Once this padding is pared away petitioners case is seen to depend upon the following simple, though untenable, chain of argument:

> a) The Committee Report statement that the "significant hazards consideration . . . criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59" is asserted by petitioners to "incorporate by reference" all of 50.59, U.S. Brief 32, 34, rather than at best simply adopt the administrative interpretation of the "significant hazards consideration" criterion apparently borrowed by Congress from 50.59.
>
> b) Regulation 50.59 and the *Vollecitos* decision which it codified is asserted to stand for the proposition that a duly requested hearing can be denied by the NRC on a license amendment found by the NRC to involve no "significant hazards consideration."

Proposition (a) above requires little discussion to refute the wildly expansive claim made by petitioners for what is rather modest language. There is simply no indication anywhere in the legislative history that Congress intended to adopt all of 10 CFR 50.59 (1963) by reference when it mentioned that the "significant hazards consideration" criterion adopted by Congress in sentence four of § 189 is also applied by the NRC under 50.59. The purpose of Congress in including this brief allusion to 50.59 is clear

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result of the fourth sentence of § 189 this would mean that affected persons would, theoretically, not necessarily have prior notice of the authorization of the changes permitted under the 50.59 provisions, while the right to a requested hearing would remain unchanged. In practice however it was clear that the *Vallecitos* approach, codified in 50.59, provided both notice and opportunity for hearing. The best evidence of the NRC's practice under the *Vallecitos* decision are actions taken with respect to license amendments in the *Vallecitos* proceeding itself subsequent to the November 18, 1960 decision later codified as 50.59. For example, a September 1, 1961 license Amendment No. 17 to the Vallecitos license DPR-1 stated that,

> prior public notice of proposed issuance of this amendment is not necessary in the public interest since [it] would not present any substantial change in the hazards to the health and safety of the public . . . .
>
> In accordance with the Commission's rules of practice (10 CFR Part 2) the Commission will direct the holding of a formal hearing on the matter of issuance of the license amendment upon receipt of a request therefor from the licensee or an intervenor within 30 days after the issuance of the amendment. 26 Fed. Reg. 8469.

This administrative practice makes clear that the NRC accorded a hearing upon request after *Vallecitos* on the kinds of issues that presented no significant hazards consideration. That Congress did not "incorporate by reference" § 50.59 in its statutory scheme did not therefore mean that Congress disapproved the Commission's practices — the straw man that petitioners would set up. See U.S. Brief 34 note 27. Congress simply achieved a similar

result in a different manner. Once sentence three did away altogether with mandatory hearings past the construction permit stage, 50.59 no longer had the same pertinence to NRC proceedings that it had before the 1962 amendments and the portions relevant to this proceeding were eventually repealed.

Finally, the notion that "the court of appeals' interpretation of the legislative history . . . fails to ascribe any independent purpose or effect to the fourth sentence" of § 189 is simply absurd. See U.S. Brief 33. The Court of Appeals gave to the fourth sentence precisely the effect its words and Congress intended, i.e. to permit the NRC to waive notice and publication of amendments found to involve no significant hazards consideration. If Congress had intended to permit the NRC to deny a requested hearing as well as waive notice and publication it could easily have found the words to do so.

3. The NRC's Own Administrative Practice Does Not Support Its Denial of a Requested Hearing Prior to Taking an Irreversible Act Pursuant to a License Amendment Found By the NRC to Involve "No Significant Hazards Consideration."

Petitioners raise the issue that the "court of appeals erroneously failed to defer to the Commission's longstanding interpretation of Section 189(a)." U.S. Brief 39. However the administrative practice offered in support of this proposition simply will not bear the weight assigned to it. Petitioners rely again principally upon the *Vallecitos* decision and its codification in 50.59 which as shown above both addressed the problem of mandatory, unrequested hearings and did not at all suggest that the NRC had authority to deny requested hearings. Met Ed Brief

27. At the time of this administrative practice the only problem the NRC had encountered concerning its single contested proceeding was the NRC's own failure to provide adequate notice and hearing which, as Intervenors noted, subjected the agency to considerable attack in Congress. Met Ed Brief 13.

Aside from these two over-used props to petitioners' case, both of which actually predated the enactment of sentence four and accordingly could be of no use in discovering administrative practice under that statute, petitioners offer very little that can be considered even relevant to the interpretation of sentence four.

Intevenors cite one lonely example of pure *dicta* from an Atomic Safety and Licensing Board decision which supports the petitioners' interpretation in this case. Met Ed Brief 29-30. But this decision is simply not the practice of the Commission itself which might be deferred to by a court. Atomic Safety and Licensing Board members are selected from outside the agency and do not include members of the Commission. Cf. 10 CFR 1.11 & 2.721. They do not form a permanent administrative organ creating a body of precedent out of a coherent fund of experience, but rather are selected from a panel to sit as *ad hoc* boards constituted for particular licensing hearings. The boards are not involved in administering the statute but rather take evidence and issue decisions on technical matters. One statement, which was in fact *dicta,* from one of these part time *ad hoc* boards in 1974 is not the kind of administrative practice that might justify the NRC's unprecedented denial of a requested hearing in this case.

From the Commission itself petitioners can only offer the bare statement that "Section 189 does permit immediate effectiveness" of amendments found to involve

"no significant hazards consideration." Met Ed Brief 29. Of course this statement says no more than that prior notice may be waived when issuing an amendment pursuant to the fourth sentence of § 189. Intervenor goes on to claim that "the Commission has consistently applied its interpretation of the Act thousands of times . . . to make license amendments effective immediately without notice or opportunity for a prior hearing." Ibid. The sense in which this statement is partially true lends no support to petitioners' attempt to overturn the decision of the Court of Appeals. There is no dispute that the NRC has authority to make "license amendments effective immediately without notice." Similarly the proposition that a prior hearing may also be omitted can be made literally true if "prior" means only prior to the authorization that may be issued without notice and does not refer to the case where a hearing may have been requested. Taken in any other sense this assertion is simply untrue. Petitioners have been unable to provide any single instance before Three Mile Island where the Commission denied a hearing that had been duly requested or where request for a hearing on an irreversible action did not suspend the effectiveness of the amendment. This would be the only kind of administrative practice relevant to this case, and it simply does not exist.

Because the petitioners offer, as examples of administrative practice supportive of their attempt to overturn the Court of Appeals' decision, matters that are wholly irrelevant to the issues at stake in this case it is important, finally, to set forth very clearly just what are the areas of difference between petitioners and respondents.

Respondents clearly do not contend that where no hearing has been requested prior to the authorization of a "no significant hazards consideration" license amendment the NRC must hold a hearing prior to the authorization. But

this nevertheless apparently forms the straw man at which much of petitioners' argument is misdirected. Respondents simply contend, first, that in every case where an affected party duly requests a hearing on a license amendment a hearing cannot be denied on the grounds of a "no significant hazards consideration" finding. Numerous references to the right to some hearing in the petitioners' briefs suggests that the petitioners do not disagree with this proposition. See U.S. Brief pp. 21, 35 notes 28 ("opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission") and 29 (§ 189 fourth sentence "does not necessarily require that a hearing be held prior to action by the Commission") Met Ed Brief 16 line 4, 17 line 13, 21 lines 5-6, 25 note 21 lines 3-5. Both briefs point out that the NRC's practice is that it "remains willing to entertain requests for a hearing filed after" it issues a license amendment. U.S. Brief 40 and note 33; Met Ed Brief 29. In fact the NRC followed its practice of offering some hearing in this very case.The problem in this case is that the offer of hearing was totally meaningless because it involved actions that were irreversible and the NRC made the novel ruling that a request for a hearing would not stay the effectiveness of the amendment. Pet. 66a. There is nothing in any legislative history even suggested by petitioners or any administrative practice of any kind prior to 1980 which would authorize the NRC to issue such a ruling under any circumstances, much less where the action authorized is irreversible.

Respondents herein have recognized from the beginning that where a "no significant hazards consideration" finding is made the basis for waiving notice, and no prior request has been made for a hearing, it will not be necesary under § 189 for the NRC to hold a hearing prior to "initial action approving the amendment" by the NRC. Respondents have insisted only that a hearing on an ir-

reversible action be held on request prior to the final issuance of the amendment (after any stay) and prior to the licensee's taking any irreversible action pursuant to the amendment. Therefore it appears that the "Argument" of petitioners stated at pp. iii & 15 of the United States' Brief is in no way inconsistent with the respondents' position consistently held in the Court of Appeals and before this Court and can be easily reconciled with the Court of Appeals' holding on the facts of this case. The hearing required to be held upon request by § 189 in the case of a "no significant hazards consideration" finding may be held "after initial action approving the amendment" provided it is held prior to final issuance and effectuation of the amendment. In the case presently before this Court the NRC contemplated a hearing only after the full and irreversible effectuation of the admendment by release of radioactive materials into the environment. Such a hearing would have been nothing other than meaningless.

Petitioners attempt to explain away the absurdity of holding a hearing on an action irreversibly taken, as the NRC proposed to do in this case, with the not quite relevant observation that the "vast majority of operating license amendments are reversible." Met Ed Brief 34. While it may very well be true that "[a]mendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review," U.S. Brief 40 note 34, it is just as clear that for those albeit few cases where the action authorized by an amendment will be irreversible a hearing after effectuation of the amendment will be meaningless. This case is not one of the "vast majority" but rather involves, as conceded by petitioners (Met Ed Brief 34), an action that was irreversible. Accordingly the interesting question of whether or not a hearing on an amendment authorizing an action that is

not irreversible may be held after effectuation of the amendment is not presently before the Court on the facts of this case. The only question is whether a hearing granted after effectuation of an admittedly irreversible action is a meaningful hearing, assuming – as it appears – that petitioners concede some hearing to be required by § 189. As the Court of Appeals simply held, "§ 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement." 651 F.2d 791 note 28. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972)

4. This Court's Upholding of the Plain Meaning of § 189 So As To Accord Requested Hearings on "No Significant Hazards Consideration" Amendments Involving Irreversible Action Will Not Introduce The Overwhelming Administrative Burdens Imagined By Petitioners

Petitioners attempt to fashion a public policy argument that if § 189 is interpreted as the Court of Appeals did interpret it below to require a hearing when requested on a "no significant hazards consideration" amendment, there will as a result occur such a flood of hearing requests as to "threaten the viability of the existing system of regulation." U.S. Brief 41. With all respect, this argument is patent nonsense. Petitioners mention no requests for hearings on "no significant hazards consideration amendments" since the November 19, 1980 decision in this case. Petitioners fail to cite one instance other than this case where intervenors have ever requested a hearing on a "no significant hazards consideration" amendment, except for the *Consumers Power Co.* case where the Atomic Safety and Licensing Board found that the hazards considerations could be significant and granted a hearing, 7 AEC 297,

298 (1974). Met Ed Brief 29-30. The Court of Appeals ruling in this case has in fact been the law of the District of Columbia Circuit since the *Brooks* decision in 1973 without stirring a flood of hearing requests. Since petitioners seemingly concede that some hearing is required, just not a *prior* hearing, the grant of a meaningfully timely hearing will not require more resources but simply better planning. Finally, this case only deals with amendments involving irreversible action. Petitioners themselves concede that such amendments are relatively rare. This concession considerably deflates their assertions about the vast consequences of the decision in this case. Petitioners' argument about the dire consequences of the Court of Appeals decision simply does not hold up against actual experience or petitioners' own statements about the rarity of irreversible amendments.

Not only do the circumstances of this case – a request for a hearing on a "no significant hazards consideration" amendment which is irreversible – seldom arise, but numerous techniques exist for expediting the NRC proceedings which are in no way compromised by the Court of Appeals' decision. In any situation where the "public health, safety or interest so requires," the NRC is permitted by regulation to make a license modification effective immediately. See 10 CFR § 2.204. The NRC enforces a rigorous standing requirement for intervenors. 10 CFR § 2.714.

Hearing examiners have authority to dispose of issues on the pleadings where there is no genuine issue as to any material fact, 10 CFR § 2.749 and may otherwise expedite proceedings, e.g. 10 CFR §§ 2.757, 2.761.

The most telling reason why the fears proffered by the NRC may be substantially discounted was well stated by

then Circuit Judge Burger in the context of standing before the FCC. The following sage observation of Chief Justice Burger is equally applicable to the petitioners' "parade of fantasized horrors" in this case:

> The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966)

Petitioners' "man bites dog" report that such intervenors are going to "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both," U.S. Brief 41, strains credulity.

5. The Important Interests of Due Process and Fundamental Fairness Require That § 189 Be Strictly and Faithfully Construed to Preserve the Public's Right to a Hearing Before Suffering the Irreversible Effects of Radiation, In the Absence of Clear and Unmistakable Evidence of Congressional Intent To Deny That Right.

The public has a profound interest in NRC licensing actions. In the course of deliberation on the Atomic Energy Act, Senator Humphrey stated:

> I think it is fair to say that no single development in the nation is more public in nature than the atomic development, for it has been paid for by all the taxpayers. 100 Cong. Rec. 10730 (1954).

Because of the continuing symbiotic relationship between government and the nuclear industry (see findings of fact in *Oklahoma* v. *Bernstein,* 5 Media L. Rep. 2313 (1980)) government has more direct responsibility for injuries suffered by the public in the context of nuclear regulation than would be the case in other regulatory contexts.

Because of the peculiar nature of radiation, prior regulation to prevent releases of radiation is the chief remedy available to those subjected to its hazards. The NRC has been given vast discretion to balance risks and benefits in this area, and the procedural rights granted the public constitute the chief means by which Congress has structured the discretion it has delegated to the NRC. Although the procedural rights at stake in this case have been accorded by statute, they are of a kind traditionally considered fundamental and have been accorded a high degree of protection by this Court.

i) The hearing right denied by the NRC was essential to elemental fairness and due process for those affected by the radiation releases.

The Fifth Amendment of the United States Constitution prohibits the Federal government from depriving any person of life, liberty or property without due process of law. The intentional release of radioactive materials into the earth's atmosphere, whether from the containment building of the partially melted-down Three Mile Island reactor or from any operating power reactor, adversely affects human life, burdening the public with debilitating disease and afflicting the genetic heritage of humanity with irreversible mutations and chromosomal aberrations. The assault of radiation on the human cell is a submicroscopic event, its consequences, though serious, are remote in time and attributable to diverse possible etiologies. Accordingly, the precise causal relationship between known quantities of radioactive materials dispersed into the environment and any particular human pathology is virtually unprovable, though epidemiological, biostatistical, and public health studies are showing that the generalized effects of low level radiation are seriously underestimated by the radiological theories of the NRC.

Though the injury inflicted upon life, liberty and property interests by releases of radioactive materials into the petitioners' environment may not be easily identified to particular individuals, there is no uncertainty that life in human cells will be damaged by this radiation,[2] the liberty

[2]"[I]t is generally believed that any exposure to radiation, however small, has adverse genetic effects and those effects are cumulative." Green, Safety Determination in Nuclear Power Licensing: A Critical View," 43 Notre Dame Lawyer 633, 645 (1968).

to be free of disease may well be infringed, and nearby property values may decline as animals die and suffer injury. Meanwhile, those who evacuated their homes to avoid possible injuries are deprived of their liberty of movement and peace of mind. As the Supreme Court ruled in *Duke Power* in light of the uncertainties about its health and genetic effects, the emission of radiation itself is a cognizable present injury to these interests. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). The nature of the interests involved here, especially protection from physical assault by radiation, are profound. There are few Due Process cases that involve tort-like interferences with life and liberty interests in the physical integrity of the person because,

> prior hearings might well be dispensed with in many circumstances in which the State's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff . . . . Monaghan, "Of 'Liberty' and 'Property,'" 62 Cornell L.R. 405, 431 (1977).

However, the nature of low level radiation injuries, the long latency period and problems of proving causation all but preclude tort recovery outside the workplace, except in such an exceptional factual circumstance as was present in *Silkwood* v. *Kerr-McGee Corp.*, 585 F.Supp. 566 (W.D. Okla. 1979), virtually the sole tort recovery for radiation injury (autopsy conducted shortly after plutonium facility worker's substantial off-site contamination, which was discovered by monitors at workplace).

For infliction of physical injury by radiation, the only effective way to accord a potential radiation victim due

process is to provide access to a hearing before the injury is inflicted. In § 189 Congress has struck a delicate balance between due process and administrative efficiency that has survived unchanged since 1962 through the most active period of reactor licensing of the 1960's and 1970's. The basic procedural rights accorded by Congress cannot be eroded by administrative interpretation without raising issues of constitutional import. This Court has stated:

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

Mathews v. *Eldridge,* 424 U.S. 319, 333 (1976).

In *Greene* v. *McElroy,* 360 U.S. 474, 507-08 (1959) the Court held:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress . . . intended to afford those affected by the action the traditional safeguards of due process. (citations omitted) These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.* (emphasis added)

While injuries from non-natural low level radiation may be a novel twentieth century phenomenon, the procedural rights at stake in these cases are as ancient as the traditions of a free people. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, (1943) (Frankfurter, J.). In a government of laws the Nuclear Regulatory Commission must also be made subject to the fundamental and minimal procedural safeguards accorded by Congress to protect our traditional liberties. Not to do this much in an area frought with political controversy is to countenance and encourage the divisiveness, alienation and stress that happens

> . . . when a substantial number of people come to believe that major decisions have been made without their consent. If the social fabric is to survive, the politics of manipulation and delegation simply must be replaced by a politics of informed consent. Wright, "Beyond Discretionary Justice," 81 Yale L.J. 575, 586 (1972)

The fallout of psychological stress and alienation which resulted from the NRC's handling of the situation underlying this case is part of the record. In hearings on the cleanup, Senator Simpson, Chairman of the Senate Nuclear Regulation Subcommittee, noted, after hearing "residents of the local population around Three Mile Island," that it was reported the NRC "approach was driving them batty." J.A. 71. Senator Simpson sensed "a community which is already anxious as a result of the accident and highly skeptical of the two organizations directly involved in the cleanup; that is, the NRC and the utility. Given this situation, it seems to me prudent if not essential for the NRC to lay out in detail for full public review the standards it expects the utility to meet and the means it will

use to ensure the compliance." J.A. 72. The need for the NRC to provide a formal means of participation in decision making about the TMI-2 cleanup was made clear by two psycholologists. Dr. Bruce Dohrenwend, Head, Social Psychiatry Research Unit, Columbia University pointed out to the NRC prior to the venting the "local citizens needs to be informed and to participate in the decisions on atmospheric decontamination. He emphasized the relationship between information and participation and the level of psychological stress within the population." J.A. 90. Dr. Colman informed the NRC, after a sham "public meeting" where the public had no apparent means for influencing decision making but was rather designed to "sell" the public a decision already made:

> As a Psychologist I am getting scared. Those Meetings are rowdy . . . . I think unless some mechanism can be developed so the people in that area have a realistic understanding that they are gaining control over the situation there by having a clear effect on the Commission about its decision, that anger level is going to keep on going. Wherever it goes, I don't want to speculate, but it is not healthy, it is not good.

These behavioral scientists are expressing in the language of their own disciplines what is perhaps the fundamental constitutive principle of our democratic polity. As a leading Constitutional law scholar has expressed it in discussing the due process right to a prior hearing,

> rights to interchange express the elementary idea that to be a *person* rather than a *thing* is at least to be *consulted* about what is to be done with one. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 503.

ii) The public has virtually no practical recourse for protection against injurious releases of radiation upon them other than a prior NRC hearing.

The Atomic Energy Act, as amended, has placed vast powers in the hands of the five person Nuclear Regulatory Commission, an independent agency whose members are appointed to five year terms by the President with the advice and consent of the Senate, 42 U.S.C. 5841(b) and (c). The Atomic Energy Act grants the NRC broad rule-making and adjudicatory powers under "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives", *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1970)

The power granted the NRC under the Atomic Energy Act in the area of protection against radiation hazards wholly preempts the police powers of state and local governments, 42 U.S.C. 2021(k); *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971) *aff'd mem.* 405 U.S. 1035 (1972). Therefore, the public must turn to the Federal government, and, within the Federal government, to the NRC as virtually its sole source of regulatory protection against radiation hazards. Cf. *Train* v. *Colorado PIRG,* 426 U.S. 1, (1976); 42 U.S.C. 6903 (27) (1976); with 40 CFR 190.10 and 42 U.S.C. 7602(g) (Supp II, 1978).

The NRC is empowered by the "Price-Anderson Act", 42 U.S.C. 2210(e) (1976) to confer a limitation of liability on its licensees for any damages in excess of $560 million, a small fraction of the damage that could result from a nuclear accident. See *Duke Power* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, (1978). For

the more insidious and less dramatic forms of radiation injuries caused by low level radiation, problems of proof, e.g. *Mahoney* v. *United States,* 220 F.Supp. 823 (E.D. Tenn.) *aff'd* 339 F.2d 605 (6th Cir., 1964), and statutes of limitations make any hope of receiving compensation for injuries by damage suits at law highly speculative. The public is accordingly not only reliant entirely upon the NRC for its regulatory protection against radiation hazards, but it is also largely dependent upon prior regulation of hazards, as opposed to *post hoc* legal remedies for damages, as a form of protection.

Notwithstanding such a scheme which combines in a single agency vast responsibility for the welfare of the public with a unique degree of untrammeled discretion, it is nevertheless true that the remedies which the public has been given in order to keep the NRC responsible have been narrow and few. Unlike statutes such as the Clean Air Act or the Safe Drinking Water Act which permit citizens' suits, see *Susquehanna Valley Alliance* v. *Three Mile Island,* 619 F.2d 231, 242 note 12 (3rd Cir. 1980), the Atomic Energy Act does not create any general public right for enforcement of environmental standards against users of radioactive material, id. 237-39. Licensees of the NRC are entirely shielded by the Agency from any direct citizens' actions in the courts under the Atomic Energy Act. Preemption prevents the state from creating any other rights enforceable in state courts. *Pacific Legal Foundation* v. *State Energy Resources Cons. & Dev. Com.,* 472 F.Supp. 191 (S.D. Cal. 1971). To protect themselves from radiation hazards created by users of radioactive materials, the public must rely upon the NRC licensing and enforcement process. It is only in the narrow framework of the NRC's administrative proceedings that the public is granted a forum within which it may attempt

to protect its interest in health and safety. Within this context the public must conform to the rules and regulations set by the Nuclear Regulatory Commission, and may appeal the final findings and rulings of the Commission only to a Court of Appeals where those findings, rulings and interpretations are accorded favorable presumptions of accuracy, reasonability, and respect, and the scope of review and opportunity for fact-finding is narrow. See e.g. *Nader* v. *NRC,* 513 F.2d 1045, 1055-56 (D.C. Cir. 1975). The rights accorded the public by Congress in its broad delegation of power to the NRC are exceedingly narrow,encompassing only the minimal due process rights of notice, public adjudicatory hearing and participation contained in § 189. Short of electing a sympathetic president who might gradually replace the NRC Commissioners or electing a sympathetic Congress which might change the whole statutory scheme for nuclear regulation, the only remedy and protection which might be pursued by citizens, such as the petitioners, residents in the vicinity of TMI-2, who find themselves victim to the radiation hazards created by an NRC licensee, is exercise of these narrow due process rights accorded by § 189.

The authority under which the NRC exercises its discretion to determine radiation hazards and to permit degradation of the environment as a cost of producing energy, is essentially similar to the legislative provisions which Justice Rehnquist would find to

> violate the doctrine against uncanalized delegations of legislative power

in *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 672, 675 (1980).

Where standards are as loose as those provided by the Atomic Energy Act it is even more essential that all of the procedural safeguards required by Congress be strictly enforced in agency decisionmaking. *See* K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Section 3.15(b) (1978) pp. 209-11. In the present case the NRC is attempting to expand its discretion so as to weaken the most fundamental of due process safeguards which were provided by Congress as a guide to agency decision making in an area of inherent uncertainty. In lieu of providing firm standards to guide the substantive decisionmaking of the NRC, Congress at least structured agency procedure so as to assure that the NRC would take into account all available information by according the public the procedural rights of notice and hearing and participation. In light of the information presented in formal adjudicatory hearings Congress expected the NRC to develop its own precedents, standards and rules. However, in this case the NRC took its very first decision in the uncharted area of a reactor accident cleanup without according those procedural rights Congress erected to assure that decisions would be well-informed and based on all available information. While those rights cannot be restored, they may be vindicated by affirming the declaratory judgment entered by the Court of Appeals below.

CONCLUSION

There is no support in the plain meaning of § 189 of the Atomic Energy Act, in its legislative history, in administrative practice under the provision, in case precedent, or in reason for the NRC's contention that it can deny, on the basis of a "no significant hazards consideration" finding, the right of an affected person to have a duly requested hearing prior to final issuance and effectuation of a license amendment.

The judgment of the Circuit Court of Appeals for the District of Columbia, below, should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.
Petitioners,

v.

STEVEN SHOLLY et al.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.

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Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

This case arose out of the 1979 accident at the Three Mile Island nuclear reactor (TMI), the first accident of its kind. The issue presented in this case is whether the Nuclear Regulatory Commission could permit release into the atmosphere of the waste radioactive materials remaining from the accident at Three Mile Island at a

rate in excess even of that permitted, though rarely experienced by, an operating reactor without providing a meaningful hearing to persons affected by the release of radiation.

An independent scientific study concluded that as a result of the release of the airborne TMI waste material into the environment, from 50 to 300 additional fatal cancers and other genetic effects will appear in the next five to 10 generations. Joint Appendix, 104.

The Nuclear Regulatory Commission (NRC) made a summary finding that the decision to release the TMI radioactive waste materials at a rate faster than that permitted an operating reactor involved "no significant hazards consideration." If supported by evidence, such a determination would have allowed the NRC, in accordance with the fourth sentence of § 189 of the Atomic Energy Act of 1954, 42 U.S.C.

§ 2239(a), to dispense with 30 days notice and publication of its decision.

Respondents challenged the NRC's "no significant hazards consideration" finding in the Court of Appeals, arguing this finding was invalid as a matter of law. See "Petition for Review of Final NRC Orders," No. 80-1691, filed June 23, 1980; "Brief for Petitioners," filed July 31, 1980, pp. 33-46; "Petitioners' Brief in Reply to Respondents," filed August 29, 1980, pp. 32-35.

After the NRC denied respondents' request for a hearing on the license amendment permitting release of radiation from TMI at an increased rate, respondent PANE petitioned the Court of Appeals to order a hearing. The NRC contended in the Court of Appeals that its finding of "no significant hazards consideration" not only allowed it to dispense with notice and publication under § 189, but, by implication, also to

dispense with a requested hearing. The NRC relied on dicta in Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084 n.36 (D.C.Cir. 1974) that "[a]n amendment can be made without an opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'"

Respondents joined to their first contention -that the NRC's action did indeed involve a significant hazards consideration- a further contention that in any event § 189 did not permit waiver of a hearing, but only waiver of notice and publication, pursuant to such a finding. See "Brief in Support of Petition to Review Final Nuclear Regulatory Commission Orders, Application for Temporary Stay and Other Relief," 80-1783, filed July 8, 1980, 12-20. The Justice Department agreed with respondents' latter contention, that § 189 would not support the NRC's argument for waiver of a hearing. See "Memorandum

of Respondent United States of America," August, 1980, pp. 4-21.

As a separate matter, respondents also argued before the Court of Appeals that the hearing required by § 189, under the circumstances of this case, would have to be a prior hearing. E.g., "Brief for Petitioners," supra, p.51 et seq. Respondents generally relied upon due process considerations reflected in the following language from Fuentes v. Shevin, 407 U.S. 67, 81 (1972):

> If the right to notice and a hearing is to serve its full purpose then, it is clear that it must be granted at a time when the deprivation can still be prevented.

Applying the due process analogy, respondents recognized that not every administrative hearing need be a prior hearing. See Arnett v. Kennedy, 416 U.S. 134 (1973). But it is clear that where an act is irreversible as here, where no important

concerns for urgent action exist, and where life and health interests are involved general due process considerations would require a prior hearing.

The Court of Appeals ruled that § 189 could not justify dispensing with a hearing altogether and also accepted respondents' argument that in this case the hearing would have to be a prior hearing. As a third matter the Court of Appeals found that the case was not moot because the agency's action in denying a hearing in these circumstances was "capable of repetition, yet evading review." 651 F.2d at 784. The Court of Appeals did not address the question whether the NRC's "no significant hazards consideration" finding was correct. 651 F.2d at 786, n.16.

I

Section 12 of Public Law No. 97-415, 96 Stat. 2067 amending § 189 did not overrule the decision of the Court of Appeals below in Sholly v. NRC, 651 F.2d 780 (1980). First, this legislation squarely rejected the NRC's position that authority to dispense with notice and publication implied a right to dispense with a hearing. Rather Congress expressly adopted the position of the Court of Appeals that a hearing is required under the clear terms of § 189. The language of the Act interpreted by the Court of Appeals has been left untouched by Congress. As stated in "Authorizing Appropriations for the Nuclear Regulatory Commission," Conference Report to Accompany H.R.2330, Rep.No. 97-884, 97th Cong., 2nd Sess. (hereafter "Conference Report"), the amendment "maintains the requirement of the current section 189a of the Atomic Energy Act that a hearing on the license amendment be held

upon the request of any person whose interest may be affected." Conference Report 37 (emphasis added).

Second, Congress cured an important defect in § 189 which was suggested in footnote 20 of the Court of Appeals' opinion, where the Court questioned, but did not answer, "whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fifth Amendment or the Administrative Procedure Act notwithstanding a finding of 'no significant hazards consideration.'" 651 F.2d at 787. By imposing new requirements for providing notice of "no significant hazards consideration" amendments, Congress expressed its "intent that, wherever practicable, the Commission should publish prior notice of, and provide for prior public comment on, such a proposed determination." Conference Report 38.

Third, Congress attempted to solve

the problem of distinguishing when a prior hearing might be waived in several ways. The new amendment lays down a general rule that pursuant to a "no significant hazards consideration" finding a prior hearing may be waived. But this authority is subject to several restrictions.

One, the NRC must consult on any "no significant hazards consideration" finding with the State in which the nuclear facility is located. §12(a)(2)(A) & (2)(C)(iii). This consultation includes prior notification of the licensee's request for such an amendment and the NRC's evaluation of it. The reasons for the proposed determination must be discussed with the State and the NRC must listen to and consider the State's comments. The NRC must make a good faith attempt to further consult before issuance of any such license amendment. Conference Report 39. While this does not provide a prior hearing, consultation with the

official local representatives of persons affected by a nuclear facility does afford some greater measure of due process rights than would the legal position advocated by the NRC before this Court.

Two, before § 12 may take effect, the NRC is required to promulgate regulations establishing standards for determining whether an amendment involves no significant hazards consideration. § 12(a)(2)(B) & 12(b). Such standards again provide a greater measure of due process protection. See generally,. K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Sec. 3.15 (1978). It is worth noting that an earlier proposed regulation, 45 Fed. Reg. 20,491-92, had no provision that would cover the instant case. It is presumed that any future regulations promulgated pursuant to this command of Congress would have greater specificity. Congress corrected one problem asserted by respondents in

this case by making clear that,

> These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations.... and should ensure that the NRC does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. Conference Report 37.

Three, Congress explained,

> the purpose of requiring prior notice and an opportunity for public comment before a license amendment may take effect, as provided in subsection (2)(C)(ii) for all but emergency situations, is to allow at least a minimum level of citizen input into the threshold question of whether the proposed license amendment involves significant health or safety issues. ...[T]he conferees expect the content, placement and timing of the notice to be reasonably caluculated to allow residents of the area surrounding the facility an adequate opportunity to formulate and submit reasoned comments." Conference Report 38.

This opportunity for reasonable notice was the principal objective of the Sholly suit.

Fourth, and most important, Congress specifically addressed the remaining issue presented by this case, that of a right to a prior hearing on license amendments involving irreversible actions. The essential question placed before the Court by this pending matter is whether an after-the-fact hearing on an irreversible action such as release of radiation satisfies either constitutional or administrative due process. See "Brief for Respondents," filed September 2, 1981, pp. 31-34. Congress addressed this specific issue as follows:

> The conferees intend that in determining whether a proposed license amendment involves no significant hazards consideration, the Commission should be especially sensitive to the issue posed by license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility or allowing a facility to operate for a period of time without full safety protections). In those cases, issuing the order in ad-

> vance of a hearing would as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. Accordingly, the conferees intend the Commission be sensitive to those license amendments which involve such irreversible consequences. Conf. Report 37-38 (emphasis added).

II

The enactment of § 12 of Pub. L. No.97-415 did not cause this action to become moot. The compliance of this litigation with the Constitution's Article III live case or controversy justiciability requirement has not been any way compromised, or even affected by, the enactment of §12. This action was not an attack on the constitutionality of a statute which has been repealed or so fundamentally altered as to cure its constitutional defect, e.g. Princeton University v. Schmid, 102 Sup.Ct. 867 (1982); Diffendorfer v. Central Baptist Church, 404 U.S. 412 (1972),

or so changed as to remove the specific complaint brought to Court by the plaintiff, Hall v. Beals, 396 U.S. 45, 48 (1969).

Here the specific complaint brought to Court by respondents (petitioners below) on behalf of the public around Three Mile Island is that the NRC intends to go forward with the clean-up of the TMI reactor in a way which would intentionally release radiation upon them, but would do so without according them a right of participation in an adjudicatory hearing on the related licensing changes. This complaint remains as strong as ever.

The Court of Appeals found that, although the specific occasion for respondents' complaint had passed, the question was representative of a greater problem which could repeat itself in the course of the clean-up and again escape review. This issue was briefed and argued below

and decided by the Court of Appeals. The Court of Appeals' decision that this case was justiciable under Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) was carefully reasoned and was not challenged before this Court.

The enactment of Pub. L. 97-415 in no way affects any of the considerations concerning mootness. The NRC is just as likely to attempt later stages of the cleanup without a prior hearing on the grounds of a "no significant hazards consideration" finding now as before. Respondents' dispute over the NRC's authority to do this is as live and real as it ever was. This case simply has not become moot as a result of enactment of a statute which may affect the outcome of the case on appeal.

While this case has not become moot, it is just as true that under long accepted precedent of this Court, Pub.L. 97-415's amendment to § 189, and its legislative

history, would now need be newly applied to the facts of this case on appeal. As stated in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282 (1969), another case where relevant new law was adopted pending appeal of the case, the "general rule ... is that an appellate court must apply the law in effect at the time it renders its decision."

Accordingly, if the Court does not dismiss its writ of certiorari, it would apply the new amendments for the first time to the facts of this case. The new amendments make two issues raised below abundantly clear, i.e. that there is 1) a right to some notice and 2) a right to an adjudicatory hearing, notwithstanding an NRC "no significant hazards consideration" finding.

As to the remaining issue of whether the hearing must be a prior hearing in the context of this case, the focus has

shifted a great deal from that which the case had in the Court of Appeals. The generalized due process considerations presented to the Court of Appeals have now been replaced by the general rule that a prior hearing is not necessary for such amendments, subject to the condition that where amendments involve irreversible consequences, the NRC should be "especially sensitive" in arriving at a "no significant hazards consideration finding." Congress' balance of priorities on this question takes fairly directly into account the facts of this case without necessarily solving the issue. Congress' approach to the issue does rely much more on the specific interpretation put on the words "no significant hazards consideration" and therefore shifts the focus of discussion away from generalized due process considerations to the meaning given these particular words.

Respondents presented to the Court of

Appeals extensive argument attacking the NRC's "no significant hazards consideration" finding as inaccurate and contrary to law. In the light of Congress' tightening up the definition of this catch phrase, previously undefined by case law or legislative history, respondents would refocus and strengthen their arguments. Because the Court of Appeals relied on more generalized due process considerations in deciding that respondents had a right to a prior hearing it was not required to address respondents' arguments attacking the NRC's "no significant hazards consideration" finding.

If the Court does not dismiss the writ of certiorari in this case, the appropriate disposition would be remand to the Court of Appeals for further briefing and decision on the issue of whether the NRC's "no significant hazards consideration" finding could be upheld and a prior hear-

ing denied under the law as newly amended. If this issue is not remanded, the Court should not decide how the new law affects this case without at least further briefing and oral argument focused on the issue.

The discussion above should make clear that this case is not moot. But, at the very least, it would be inappropriate to dispose of this case on the ground of mootness at this stage before the question has been fully briefed, and possibly argued.

III

The writ of certiorari previously granted in this case should now be dismissed. The purpose of this case was to construe the intent of Congress as to whether and when a hearing would be required on a license amendment which involved irreversible consequences but upon which the NRC had made a "no significant hazards consideration" finding.

Congress has now unqualifiedly expressed its intent, leaving no room for construction, that a hearing is required in such cases. This has reduced the importance of this case, which was never very great, and leaves for decision only the question as to when such a hearing must take place. The Court of Appeals did not dwell long on the latter question, and now Congress has provided guidance which completely changes the focus of the inquiry. As stated in a case having a similar factual background: "The focus of this lawsuit has been completely blurred" by this change in law on appeal. See Sands v. Georgia, 401 U.S. 144, 152 (1971). (As here, it was clear in Sands that the case did not become moot because of the change in law, id. 151)

In Sands the Court remanded for further proceedings in order to make a record and sharpen the issues in a manner appropriate for Supreme Court review. As

discussed above this would be a proper disposition for this case as well. But the most appropriate disposition would be to simply dismiss the writ of certiorari. Congress has now construed its own statute in light of the specific facts of the Sholly case. It has made improvements in the level of due process accorded the public. It has made an attempt at balancing diferent interests in determining hearing rights on "no significant hazards consideration" amendments. This new construction of § 189 by Congress is based squarely on the assumption that the Court of Appeals had properly construed the statute in Sholly. Congress made it clear that it intended by the new amendment of § 189 to grant "new authority" to the Commission, not to reestablish old authority mistakenly withdrawn by the Court of Appeals. See Conference Report 36; Congressional Record H8822, Dec. 2, 1982 (Rep. Udall,

House sponsor). Congress did not choose to wait for a more authoritative interpretation of the statute from this Court before acting. It accepted the Court of Appeals' construction of the statute as correct and built on that interpretation toward a new framework for accommodation of the respective interests involved.

The only remaining issue left on appeal in this case must be viewed in light of Congress' new framework for resolving when a prior hearing is required on a "no significant hazards consideration" license amendment. Because Congress has provided fresh guidance on that issue, the need for a decision by this Court to assess the intent of Congress is now less compelling than it might have been when the writ of certiorari was granted.

Proper resolution of this case under the new amendments would require a remand to the Court of Appeals. But any subse-

quent repetition of the problem presented here would also need be presented to the Court of Appeals in a new lawsuit. It would promote judicial economy to permit the Court of Appeals to measure against the Congressional language a new set of facts. It would promote judicial economy to bring this teapot tempest to an end by simply dismissing the writ of certiorari at this time on the grounds that further clarification of the law after Congress has so recently acted does not justify consumption of this Courts' parsimoniously allocated certiorari jurisdiction.

In any event this case is not yet ripe for resolution under the new law because the law will not go into effect until regulations are promulgated by the NRC. § 12 (b), Pub. L. 97- 415. Since the regulations are an integral part of the new statutory scheme this case cannot be resolved under the new law until those regulations have been promulgated.

Conclusion

Respondents oppose the Solicitor General's suggestion of mootness on the grounds of a change in law for the simple reason that the change in law has no bearing whatsoever on the question of mootness in this case. The Solicitor General has cited no case presenting similar facts where the Court has made a finding of mootness.

Cited above are several cases which were found moot under strikingly distinguishable facts, or which were not found moot under similar facts. Cases similar to this one have been remanded for further focusing of the record.

The most appropriate resolution of this case is dismissal of the writ of certiorari, since Congress has confirmed that the Court of Appeals properly construed the intent of Congress in its

decision below and application of the new law enacted by Congress in response to the decision would better await a new fact situation which might develop in light of the new law. In any event no finding of mootness should be made until that issue can be fully briefed and argued by the parties.

Respectfully submitted,

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February 11, 1983

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Nos. 80-1640 and 80-1656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents' opposition to our suggestion of mootness warrants a very brief reply.

1. Contrary to respondents' contentions (Opp. 7-8), neither the newly amended Atomic Energy Act nor its legislative history reflects approval of the decision of the court of appeals. On the contrary, as explained in our suggestion of mootness, and as respondents elsewhere acknowledge (Opp. 9, 17), the Amendments make clear that the Commission may dispense with a prior hearing when an operating license amendment is determined to entail "no significant hazards consideration." Respondent stresses (Opp. 7-

13) that the new legislation refines in various respects the rule previously advocated by the Commission as a matter of interpretation of the pre-existing language of Section 189(a) of the Atomic Energy Act. But that does not alter the fact that the enactment of this legislation eliminates any remaining controversy as to the proper interpretation of the former provisions of law, and therefore renders this case moot. __/ Contrary to respondents' assertion (Opp. 24), there is ample precedent for issuance of a Munsingwear order when a controversy is overtaken by amendatory legislation. See, e.g., Chicago Board Options Exchange v. Board of Trade of Chicago, Nos. 82-327 & 82-526 (Nov. 29, 1982); State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981).

2. Contrary to respondents' suggestion, there is no occasion for this Court either to "apply the new amendments to the facts of this case" (Opp. 16) or to remand this case to the court of appeals (Opp. 18).

a. There is no reason for this Court to apply the new amendments to the facts of this case. The question whether the Commission's orders would have been upheld under the amended statute is entirely academic. No meaningful relief can now be awarded respecting the Commission's orders. No jurisdiction exists to enter such an advisory opinion.

__/ While the amended Section 189(a) does not in all respects track the Commission's contentions respecting its predecessor, the differences are the result of refinements and distinctions that are legislative in nature and would have been beyond the power of the courts to establish. In any event the amendments to Section 189(a) plainly do not adopt the court of appeals' view on the question presented: the necessity of a prior hearing. Plainly, the enactment of the "Sholly" Amendment to Section 189(a) (see H.R. Rep. No. 97-884, 97th Cong., 2d Sess. 36 (1982)) does not reflect the view that Sholly was rightly decided. See also 128 Cong. Rec. S 15314 (daily ed. Dec. 16, 1982) (remarks on the conference report of Senate Manager Senator Simpson: "The Sholly provision corrects what most all of us have viewed as an erroneous judicial interpretation of the hearing requirement for 'no significant hazards consideration' amendments by providing that no hearings in advance of these types of determinations are required"); see also 128 Cong. Rec. S 15315 (daily ed. Dec. 16, 1982) (remarks of Sen. Domenici).

This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Pet. App. 9a). As indicated in the suggestion of mootness (page 4), the recent amendments to Section 189(a) eliminate all possibility that that statutory question will reoccur. Respondent's observation (Opp. 15) that the NRC may continue to avail itself of its authority to make its "no significant hazards consideration" amendments immediately effective misses the point. The legal questions that could be raised should the Commission employ that authority in the future would be entirely different from those raised heretofore in this case. Moreover, the academic question whether the Commisison's orders in this case complied with the subsequently amended Section 189(a) would shed no light on the issues that might arise in further litigation. Thus, there is no longer any issue that is capable of repetition, yet likely to evade review.

b. There is no reason to remand this case to the court of appeals either for exploration of the validity (under the former statute or the present statute) of the Commission's "no significant hazards" finding in this case (Opp. 18-19), or for the exploration of a constitutional question that respondent intimates to be present (Opp. 5, 12). Plainly, the question whether the no significant hazards determination in this case was proper is not capable of repetition, and it does not "continue[] to affect a present interest." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-126 (1974). Accordingly, that question is moot. __/

__/ The court of appeals did not suggest that the validity of the no significant hazards determination escaped mootness under the recurring question doctrine; the court below merely held that the separate question of interpretation of Section 189(a) was not moot.

Contrary to the respondent's suggestion (Opp. 5, 12), the issue in the court of appeals was never of constitutional dimensions. Any constitutional challenge respondents might wish to mount to the newly amended statute will have to await the advent of a concrete controversy.

3. Respondents do not quarrel with our submission that this Court should not render any decision in this case and that the controversy has been robbed of all vitality (see Opp. 19-23). They nonetheless seek to avoid vacatur of the judgment of the court of appeals suggesting that our petition should merely be dismissed (Opp. 24). No precedent is cited for that disposition. And it would be inappropriate to allow the judgment of the court of appeals to stand because the Court has determined that further review is warranted in this case, but intervening circumstances have deprived petitioners of an opportunity for that review. Accordingly, this Court should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while awaiting this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the petitions for review as moot. See, e.g., Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979); United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).

The private petitioners have authorized us to state that they join in this submission.

For the reasons stated, and those previously stated in our suggestion of mootness, it is respectfully submitted that the judgment of the court of appeals should be vacated, and the case remanded with instructions to dismiss the petitions for review as moot.

REX E. LEE
Solicitor General

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

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February 11, 1983

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RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

On February 17, 1983 the Solicitor General filed with the Court the "Petitioners Reply Memorandum in Support of Suggestion of Mootness" (Rep. Mem.). Respondents submit the following arguments in response to Petitioners' Memorandum.

1. Federal Petitioners argue that, because under the new Amendments to § 189 of the Atomic Energy Act, the "[Nuclear Regulatory] Commission may dispense with a prior hearing when an operating license amendment is determined to entail 'no significant hazards consideration,'" there can be no doubt that under the facts of this case the NRC could validly dispense with a prior hearing; and therefore, they argue, this case is moot. (Rep. Mem. 1-2)[1]

---

1. Petioners quote the Senate manager of the "Sholly" amendment for the proposition that the Court of Appeals made an "erroneous judicial interpretation of the hearing requirement." (Rep. Mem. 2, note) However, a reading of the legislative history reveals that many of the supporters of the amendment were unable to distinguish between the ruling in Sholly and the possible implications of that ruling. This was not surprising inasmuch as the NRC represented to Congress, as it did to the Court below, that the Sholly decision would have dire consequences and implications which it indeed did not. Cf. "NRC Motion to Stay Issuance of Mandate,"

This argument is misplaced for two reasons. First, the Amendments do not remove doubt whether a hearing was required under the facts of this case. Rather Congress clearly suggested that a hearing is required under the circumstances of this case. See "Opposition to Federal Petitioners' Suggestion of Mootness," 12 (Opposition). Second, even if Congress did pass a law which replaced a vague rule with a rule of unmistakeable clarity, such action by Congress does not moot a case which is otherwise a live Article III "case or controversy" [2].

(footnote continued)
dated December 10, 1980 with "Petitioners' Opposition to NRC's Motion to Stay Issuance of Mandate," filed December 17, 1980. Because of this deception Congress in the end passed Pub. L. 97-415 which it thought was necessary to overturn Sholly yet did not in fact overturn the decision, but rather did no more than limit it in scope.

2. This truism might be more obvious to Petitioners were they in the position of Respondents before the Court. Surely the positioning of the parties on appeal does not affect the mootness vel non of an issue one way or the other.

Cases cited by Federal Petitioners are not to the contrary. In the Chicago Board Options Exchange v. Board of Trade of Chicago, __U.S.__ (Nov. 29, 1982) the Court of Appeals had "held that pending any future action by the Commodity Futures Trading Commission all trading of options on GNMA bonds is prohibited." (emphasis added). The holding of the Court of Appeals became moot in the Supreme Court when regulatory action satisfied the condition which qualified the holding. 677 F.2d 1137 (7th Cir. 1982). The fact that the holding became moot by its very terms when the Trading Commission acted makes the Chicago case clearly distinguishable from this case.

In State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981) a ruling became moot when the law was changed so as to make the remedy asked for in the suit unavailable.

Again, the State Fair case has no bearing on this declaratory judgment action.

2. Federal Petitioners next contend that,

> This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Rep. Mem. 3).

Federal Petitioners' interpretation of the Court of Appeals decision is simply wrong. This does not state the question decided, and determined not moot, by the Court of Appeals. Indeed, if this were the quesiton decided and determined not moot by the Court of Appeals - whether an NRC interpretation is correct or not - this would present the epitome of a case non-justiciable because it calls for an advisory opinion.

The issue presented to the Court of Appeals was adequately stated by the Court of Appeals itself in the section of its

opinion titled "Mootness," 651 F.2d at 785, where it said,

> The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative....

The issue before the Court of Appeals was not an abstract question concerning a particular interpretation of law by the NRC; it was rather the very real question of whether under the law the NRC could avoid a requested hearing on licensing action involving the release of radiation into the atmosphere. Respondents contend that the answer to that question under the Amendment is "no" just as it was under the pre-existing law.

Petitioners claim that no meaningful relief can be had in this case under the new amendment. (Rep. Mem. 3). But the only relief available under the pre-existing law was the declaratory judgment entered by the Court below. This was a

meaningful remedy precisely because it would help to prevent recurrence of the denial of a meaningful hearing under the circumstances of this case. A ruling based upon § 189 as amended would have precisely the same effect. It is just as likely now as it ever was that the NRC will attempt to use a "no significant hazards consideration" finding to deny a hearing in the circumstances of a radiation release presented by this case.

The judgment of the Court of Appeals was that "[t]he NRC's refusal to hold a hearing violated the petitioners' statutory rights." 651 F.2d at 791. This judgment is as valid now, after the enactment of the amendment, as it was before. The amendment concededly affects the reasons a Court would apply to reach this judgment; but it does not affect the judgment.

Petitioners claim that in future cases where the NRC repeats its refusal to hold a

requested hearing on licensing actions involving emissions of radioactive materials, "[t]he legal questions that could be raised ... would be entirely different from those raised heretofore in this case." (Rep. Mem. 3). This statement is simply false.

The legal question in future such cases will focus on whether the licensing action in fact does raise "significant hazards considerations" within the meaning of that phrase as newly elucidated by Congress. This precise issue was squarely put to the Court of Appeals. In their briefs below Respondents argued, in rather great detail, the proposition that the "NRC's 'no significant hazards consideration' determination is invalid both as a matter of law and as a matter of fact." "Brief of Petitioners," filed July 31, 1980, p. 17 ff. The precise arguments made there have now in fact been strengthened by the

action of Congress. See Opposition 11-12. The Court of Appeals, in light of its analysis of the plain language of § 189, simply did not deem it necessary to address this issue. 651 F.2d at 786 n.16. But before the Court of Appeals' judgment can be attacked on the grounds of mootness under the new law this issue must be resolved.

The issue involved in this case, squarely raised below, is one that will arise again in future cases. The non-compliance by the NRC with its duty to provide a hearing on this kind of licensing action, one which risks the life and health of affected persons, is fully capable of repetition. The analysis under the new law is similar to the analysis which the Court of Appeals was asked to apply to the old law, but would now be made with the benefit of important clarification by Congress favorable to the position of Respondents.

b) Petitioners contend that there would be no reason to remand this case to the Court of Appeals, as suggested by Respondents, to consider the issue presented in light of the new amendment. However, the Supreme Court has routinely held that cases on appeal are subject to the law in effect at the time of decision and that where a clearer focus of the record is required to apply that law, remand is appropriate. Opposition 15-16, 20-21

Petitioners next state that "the issue in the court of appeals was never of constitutional dimensions." (Rep. Mem. 4). This is a clear mistatement of fact belied by the record below. Respondents, in their principal brief to the Court of Appeals, argued at some length on constitutional issues, "Brief of Petitioners," 18-33, to the conclusion that "the NRC has raised serious

constitutional problems under the long dormant 'delegation of power' doctrine and under the Due Process Clause." Id. 32.

It has been possible to avoid these constitutional issues only so long as a right to hearing on licensing actions involving releases of radiation is preserved under the statute. For the very same reason that the NRC is likely to repeat the denial of hearing in these circumstances, the constitutional questions are also not moot.

3. Petitioners state that no precedent has been cited where this kind of case has been disposed of by way of dismissal of the writ of certiorari. (Rep. Mem. 4). Abundant examples exist of where the Court has dismissed the writ of certiorari because a case has lost importance while pending decision. Cf. Supreme Court Rule 19.

One way in which the Court has deemed

cases to have lost importance has been when new law vitiated the import of the question presented on certiorari.

For example, in Cook v. Hudson, 429 U.S. 165 (1976) the Court granted certiorari to consider whether the First and Fourteenth Amendments prohibited a state school board from firing teachers who sent their own children to private schools which discriminated on the basis of race. An intervening decision of the Supreme Court held that 42 U.S.C. § 1981 prohibited private schools from discriminating. This made potential application of any right the Petitioner might have established of limited importance. The Supreme Court, accordingly, dismissed the writ of certiorari; the Court did not declare the case moot. See also Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (Harlan, J., concurring) (writ of certiorari dismissed in case brought under

an Act repealed after certiorari had been granted.)

These cases, though arising under circumstances different from the instant case, show that a change of law on appeal can impair the importance of a case for purposes of certiorari jurisdiction in the Supreme Court.

4. Petitioners have used the enactment of Atomic Energy Act amendments to reargue an issue resolved in the Court of Appeals and not formally presented to this court in the petitionfor writ of certiorari. While mootness is of jurisdictional significance, this is no reason to shortcut the deliberate process of briefing and decision-making in the Supreme Court. This issue of mootness has been brought before the Court in too precipitous a fashion. See Respondents' "Application for Extension of Time To

Answer," filed January 25, 1983.

There is no urgency in this case, by consent of the parties a long-pending case before the Supreme Court, to warrant this schedule. If the Court is unable to conclude that the case has so lost importance that the writ of certiorari should be dismissed, and wishes to address the mootness question, the case should be set down for full briefing and argument on the mootness issue that has now been presented to the Court by the Petitioners.

Respectfully submitted,

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February 18, 1983

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PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent

[1] While the other parties have consented to the filing of this brief *amicus curiae,* respondents Stephen Sholly, *et al.,* have not consented to EEI's participation at this stage of the proceeding. The letters providing written consent have been filed with the Clerk of this Court.

of the nation's electricity users. EEI's members include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the Nuclear Regulatory Commission ("NRC") or for which applications for construction permits are pending.[2] In 1980 nuclear power plants produced 11 percent of the domestic electricity generated from all fuel sources by generating 251,122 million net kilowatt hours of electricity.[3] In 1979, the latest year for which figures are available, EEI member companies produced 83.7 percent, or 213,132 million net kilowatt hours, of the total nuclear power generated.[4]

As of December 31, 1979, 40,917,550 customers in 34 states were within the service areas of the EEI member utilities having operating nuclear plants and received direct benefits from the electricity they produced.[5] Customers in other areas and states received indirect benefits from these plants under regional interconnection agreements which, through regional transmission line grid systems, provide for the sale and purchase of electricity among participating utilities.

All 87 of the EEI members having an interest in operating or proposed nuclear power plants are impacted by and have an identifiable interest in the efficient and timely operation of the NRC licensing procedures. The decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals")

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[2] U.S. Nuclear Regulatory Commission, *Owners of Nuclear Power Plants,* NUREG-0327, Rev. 2 (December 1979).

[3] U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* 70 (March 1981).

[4] U.S. Nuclear Regulatory Commission, *Operating Units Status Report,* NUREG-0020, Vol. 4, No. 1 (January 1980).

[5] Edison Electric Institute, *Catalogue of Investor-Owned Electric Utility Companies Operating in the United States,* 20th Ed. (1981).

therefore involves matters of vital concern to EEI and its members. Because the interest of private electric utilities nationwide and of the millions of customers they serve is not represented by any party to this action, EEI seeks this Court's permission to represent this interest through the attached brief.

The holding below would impose substantial new administrative burdens upon the NRC by requiring the NRC to hold hearings prior to acting on requests for amendments to operating licenses which the NRC has determined involve no significant hazards consideration. The NRC's compliance with these requirements would increase the burdens on the licensees involved in obtaining license amendments which involve no significant hazards consideration. More significantly, nuclear power plants might have to shut down or a scheduled shutdown might be prolonged pending completion of the hearing mandated by the Court of Appeals' decision even though such a hearing will provide little offsetting benefit to public health and safety. In addition, in order to hold the required hearings the NRC would have to divert limited administrative and staff resources from other proceedings involving more significant issues. This would in turn delay those proceedings and increase, without commensurate public benefit, the time and expense of obtaining construction permits, operating licenses and significant amendments to operating licenses and subject consumers of electricity across the nation to potential billions of dollars of additional costs resulting from additional delays.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The attached brief *amicus curiae* sets forth detailed factual information regarding the administration of the NRC licensing process to provide a

broader perspective for this case and to demonstrate that the Court of Appeals' decision improperly imposes substantial and unjustified procedural requirements upon the NRC.

CONCLUSION

For the reasons set forth above, and in the attached brief, EEI urges this Court to grant its Motion for Leave to File the attached brief as *amicus curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1640
No. 80-1656

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA, *Petitioners,*
v.
STEPHEN SHOLLY, *et al., Respondents.*
METROPOLITAN EDISON COMPANY, *et al., Petitioners,*
v.
PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitioners, the United States Nuclear Regulatory Commission ("NRC") and the United States of America ("Government Petitioners") and the Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petitioners"), in this case. Petitioners and EEI urge this Court to reverse a holding of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that the NRC must hold a prior hearing on any nuclear power plant operating license amendment upon the request of an interested party even though the amendment has been determined by NRC to involve no significant hazards consideration. Utility Pet. for Certiorari, App.C.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent of the nation's electricity users. EEI's member companies include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the NRC or for which applications for construction permits are pending. As discussed in the foregoing Motion for Leave to File, the decision of the Court of Appeals concerns matters of vital importance to EEI and its members regarding the efficient and practical administration of NRC's regulation of the construction and operation of nuclear power plants.

SUMMARY OF ARGUMENT

1. The Atomic Energy Act imposes extensive administrative responsibilities upon the NRC to require the safe construction and operation of nuclear power plants. Before the NRC can approve construction of a nuclear power plant it must conduct an adjudicatory hearing which thoroughly investigates all necessary considerations, including health and safety issues, and must separately analyze the environmental impacts of the proposed plant. The NRC must conduct an additional hearing prior to approval of an operating license for a nuclear power plant, if requested. Thus, by the time an operating license is issued, the NRC will have thoroughly considered all relevant health and safety considerations raised by interested parties.

An operating license is a complex document which sets forth many detailed terms, conditions and specifica-

tions which frequently require modification. The NRC expects to complete action on 2,500 license amendments in fiscal 1981. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Upon request, the NRC will hold hearings prior to approval of significant amendments to operating licenses.

Before the decision of the Court of Appeals, the NRC approved without a prior hearing license amendments which it determined involved no significant hazards consideration, provided that notice of approval was published in the *Federal Register.* The public was permitted to request a hearing subsequent to such approval. In making the decision which amendments qualified for such treatment the NRC was guided by several criteria developed during years of consistent administrative practice.

The average time necessary to obtain a construction permit or operating license is over three years. The record developed during initial hearings addresses numerous complex technical issues and is extremely large. NRC's Atomic Safety and Licensing Board Panel, which hears and resolves the issues raised at these hearings, is understaffed and is straining its resources to consider the 42 proceedings the NRC anticipates will be heard this year. It will be unable to handle properly a significant number of new cases.

The NRC has on the average approved approximately 400 license amendments with no significant hazards consideration during each of the past four years. If hearings are held as a result of the decision below for only a small proportion of these amendments, the entire NRC hearing process could be disrupted and delays as long as nine months for each such license amendment could occur. This could force or

prolong many plant shutdowns. The additional staff responsibilities could also delay hearings which consider significant issues regarding construction permits, operating licenses and significant license amendments. The shutdown of nuclear power plants would require the expenditure of hundreds of thousands of dollars per day per plant for replacement power and the incremental cost of such power would be borne eventually by consumers throughout the country.

The opinion below thus threatens to disrupt substantially the NRC's ability to carry out important statutory responsibilities and to increase the cost of power throughout the country with little commensurate benefit to public health and safety.

2. The Court of Appeals adopted an admittedly "paradoxical" construction of Section 189(a) of the Atomic Energy Act, as amended. This contravenes the fundamental rule that anamolous or absurd statutory construction is to be avoided. *In Re Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978).

Any potential question regarding the meaning of Section 189(a) is resolved by its legislative history and the Commission's longstanding interpretation. The relevant language of Section 189(a) had been adopted in 1962 shortly after the Commission implemented, first by adjudication and then by rulemaking, a procedure which permitted the staff to identify and approve insignificant license amendments without prior notice or hearing. *General Electric Co., (Vallecitos Boiling Water Reactor)* 1 A.E.C. 541 (1960); 27 *Fed. Reg.* 5491 (June 9, 1962). The Joint Committee Report regarding the 1962 amendments demonstrates congressional awareness of the Commission's regulation expediting the approval of insignificant amendments, with no express or implied

rejection of this approach. S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). The Report also emphasizes the goal of expediting the licensing process. *Id.* Accordingly, it is reasonable to conclude that Congress intended to affirm the Commission's practice of screening out insignificant cases from those eligible for a prior hearing. The legislative history certainly does not show that Congress expressly intended a "paradoxical" statutory scheme that would be either ineffective or favor those few with preferential access to the Commission.

Moreover, within a few months after the passage of these amendments the Commission adopted regulations which reaffirmed its prior procedure for approval of insignificant license amendments. 27 *Fed. Reg.* 12184 (December 8, 1962). The procedures established in these regulations had been in effect for almost 20 years prior to the decision below. Such contemporaneous and longstanding interpretation deserves considerable deference from this Court. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.,* _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981).

Since the Court of Appeals' interpretation of Section 189(a) is erroneous, and since that Court may not impose procedural requirements upon the Commission in excess of the *minima* required by statute, its decision must be reversed.

ARGUMENT

A. THE COURT OF APPEALS' DECISION IMPOSES PROCEDURES WHICH WILL DELAY SUBSTANTIALLY THE NRC's ADMINISTRATIVE PROCESS WITHOUT COMMENSURATE JUSTIFICATION.

In order to assist this Court in its review of the decision of the Court of Appeals, it is helpful to reiterate the procedures the NRC currently applies in regulating nuclear power plant construction and operation. These procedures were succinctly described by this Court in its decision in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526-527 (1978):

> Under the Atomic Energy Act of 1954 . . . as amended . . . the Atomic Energy Commission[2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. . . . In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. . . . This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application. . . .[3] The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA) . . . and prepares a draft environmental impact statement, which, after being circulated for comment . . . is revised and becomes

> a final environmental impact statement. . . . Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing . . . and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. . . . The final agency decision may be appealed to the courts of appeals. . . . The same sort of process occurs when the utility applies for a license to operate the plant . . . except that a hearing need only be held in contested cases and may be limited to the matters in controversy.[5] (citations and footnote omitted)

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[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974. . . . Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards."

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. . . . The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit.

Thus, by the time an operating license is issued, the NRC will have held at least one adjudicatory hearing and may have held a second hearing addressing public health and safety issues relevant to constructing and operating a particular nuclear power plant.

The operating license is a complex document containing detailed terms, conditions and technical specifications which can run to hundreds of pages in a

typical license. Utility Pet. for Certiorari, App. F at 62a, Boyd Aff. para. 4. Because of their technical detail and scope, operating licenses and technical specifications frequently require modification. Any change to an operating license including technical specifications, no matter how minor, requires an amendment to the operating license. 10 C.F.R. §50.59(a)(1)(c).

Under Section 189(a) of the Act, 42 U.S.C. §2239(a), license amendments which involve significant new hazards consideration may be granted without a hearing following thirty days notice in the *Federal Register.*[1] If a hearing is requested, however, it must be held prior to approval of such amendments. *Id.* Prior to the decision of the Court of Appeals below, the NRC had interpreted Section 189(a) to provide that a license amendment which it determined involved no significant hazards consideration could be approved without a prior hearing (10 C.F.R. §50.58(b)) and simply published notice of approval in the *Federal Register.* The NRC had stated that it retains administrative discretion to provide a hearing before acting on such amendments. 45 *Fed. Reg.* 20491, 20492 (March 28, 1980). Members of the public who requested a hearing would have received one after approval of the amendment. Government Pet. for Certiorari at 16.

The NRC is currently proposing to amend its regulations to specify criteria to be used to determine whether a license amendment involves no significant hazards consideration. 45 *Fed. Reg.* 20491. This proposal indicates that in the past the NRC staff was guided by the following examples of amendments that

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[1] Section 189(a) is set forth in page 2 of the Petition for a Writ of Certiorari of the Utility Petitioners.

were not likely to involve significant hazards consideration (*id.* at 20492):

(i) A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations.

(viii) An extension of the date, in a construction permit, for the completion of construction.

Under these examples, operating licenses were routinely amended whenever a nuclear power plant changed its fuel supply to accommodate minor technical differences in fuel characteristics and to enable a plant to conform to new regulations, such as those the NRC recently promulgated imposing additional fire safety measures (45 *Fed. Reg.* 76602 (November 19, 1980)). Other examples of no significant hazards consideration amendments are identified in our Brief *Amicus Curiae* In Support of A Petition for a Writ of Certiorari. EEI Brief *Amicus Curiae* Re Pet. for Certiorari at 6.

The NRC Notice of Proposed Rulemaking also identifies the following examples as license amendments the staff has considered likely to involve significant hazards consideration (45 *Fed. Reg.* 20492):

(i) A significant relaxation of the criteria used to estaolish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.

(iv) Renewal of an operating license.

(v) For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.

(vi) A change to technical specifications involving a significant unreviewed safety question.

NRC has regularly provided notice and an opportunity for a public hearing prior to approval of these and similar amendments.

The procedures for granting construction permits, operating licenses and amendments to operating licenses impose substantial administrative responsibilities upon the NRC. As this Court noted in *Vermont Yankee,* each adjudicatory hearing is conducted by a three-member board of the Atomic Safety and Licensing Board Panel ("ASLBP"). 42 U.S.C. §2241. As of September 30, 1980, the ASLBP consisted of 52 individuals, only 13 of whom are permanent members. Nuclear Regulatory Commission, *1980 Annual Report* at 234. These members include 17 lawyers, 17 environmental scientists, 10 engineers, 6 physicists, 1 economist and 1 chemist. *Id.* According to the Commission, a board generally consists of a lawyer-chairman, a nuclear engineer or reactor physicist and an environmental scientist. *Id.* A hearing before a board is generally divided into two separate phases, one to consider health, safety, common defense and security issues and the other to consider en-

vironmental factors. 10 C.F.R. §2761a. Separate decisions may be issued for each phase. *Id.* In addition, antitrust issues are heard and decided by a separate board.

As of December 31, 1980, there were 68 nuclear plants licensed to operate, 82 plants with construction permits, 2 plants licensed for low power operations and 11 plants under review for construction permits. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Construction permit hearings must be held for the 11 plants under review for construction permits and licensing hearings would be held, if requested, prior to issuance of operating licenses for these plants and the additional 84 plants with construction permits or low power licenses. License amendments will be filed on a frequent basis for all plants in operation. During fiscal 1980 approximately 1,900 amendments to operating licenses were reviewed and processed. Nuclear Regulatory Commission, *1980 Annual Report* at 5. NRC expects to complete 2,500 such actions in fiscal 1981. *Id.*

According to the Chief Administrative Judge of the Atomic Safety Licensing Board Panel, as of February 25, 1981, the ASLBP reported 62 active proceedings on its docket of which 42 could go to hearing within a year. *Energy and Water Development Appropriations for 1982*: Hearings before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. 883 (1981) (Memorandum to Commissioners of the NRC from B. Paul Cotter, Jr., Chief Administrative Judge, ASLBP (February 25, 1981)) (hereafter *Appropriations Hearings*). The Department of Energy estimates that it takes eleven years from initial planning until commercial operation of a nuclear power plant. Department of Energy, Energy Information Administration, *Nuclear Power Regulation* at 6 (May 1980). The complexity of the licensing process is a major

factor in this long lead time. The average time between applying for a construction permit and the initial decision by the ASLBP board is in excess of three years. *Id.* The time necessary for granting an operating license takes another three years or more. *Id.* The length of this process is caused by several factors including the presence of many parties, the difficulty of scheduling hearings to accommodate ASLBP members and interested parties, and the complexity of the issues involved. One recent case, involving Pilgrim Nuclear Power Station, Unit 2, required 66 days of hearings during which 12,000 pages of testimony, often involving very complex issues, and 128 exhibits, several hundred pages long, were obtained. *Appropriations Hearings* at 886. The briefs and proposed findings of the parties totalled 800 more pages. *Id.* The board was required to review and reach a decision on 56 issues and contentions raised during this process. *Id.* at 887. It held 12 conferences over 20 days to discuss these issues and required substantial additional time to study, summarize and index the record and write an opinion. *Id.* at 888-889. Conferences and drafting of an opinion are often delayed because board members are hearing other cases while a decision in one case is being prepared. *Id.* at 889. The Chief Administrative Judge concluded that the ASLBP is presently understaffed (*id.* at 886) and does not have adequate resources to handle properly any significant number of new cases (*id.* at 893).

Since staff resources are already strained and contribute to delays in the scheduling and resolution of hearings, the addition of a significant number of hearings on no significant hazards consideration amendments would cause substantial additional delays. The extent to which the Court of Appeals' decision will

stimulate such hearings is, of course, still speculative. Nevertheless, the potential for additional hearings is obvious. In the past four years the NRC has approved more than 1600 operating license amendments that it determined raised no significant hazards consideration. Government Pet. for Certiorari at 15. As the statement of four judges of the Court of Appeals objecting to denial of rehearing *en banc* points out (Utility Pet. for Certiorari, App. A at 13a), under the decision of the Court of Appeals below, "almost any expression of interest" in the licensing and operation of a nuclear power plant by a member of the public constitutes a "request" for a hearing and "the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment." Consequently, where continuing interest exists, the NRC may feel required to schedule hearings even though no formal request has been made. At any rate, a simple request from an interested party would necessitate a hearing before such an amendment is approved.

By one estimate the expected delay in processing a no significant hazards consideration operating license amendment attributable to a *Sholly* hearing would be at least nine months. Utility Pet. for Certiorari at 15. Depending on the nature of the amendment, such delay on an amendment determined to involve no significant hazards consideration could force an operating plant to shut down, prolong the scheduled shutdown of a plant or force it to operate at reduced power for months. The NRC has stated to Congress that "[o]ver the past few months some 20 of the nation's 72 nuclear power plants would either have had to shut down or operate at reduced power if they had not been accorded the authority sought in license amendment requests that involved no significant hazards considerations." *Appropriations Hearings* at 1110 (Response to Questions

Submitted to NRC). The additional staff responsibilities for hearings on such amendments could also delay consideration of construction permits, operating licenses and significant amendments as well. The NRC has predicted that the decision of the Court of Appeals raises "the prospect of a substantial curtailment of nuclear power plant operations for reasons which, in the Commission's view, are unrelated to the safety of the nuclear power plants." *Id.*

While absolute quantification of the impact of the Court of Appeals' decision on delays in the NRC licensing process is not feasible at this time, there should be little doubt that the financial costs upon electric utilities and their customers will be very large. The Department of Energy ("DOE") recently stated that the incremental cost of replacing nuclear power generation lost by reasons of licensing delays varies anywhere from $100,000 to $750,000 per day. U.S. Department of Energy, Office of Nuclear Reactor Programs, *Update, Nuclear Power Program Information and Data* 60 (January/February 1981). This variation exists because companies which can obtain substitute electricity generated from expensive oil generally experience higher replacement costs than those firms which rely upon coal as their replacement fuel. Based upon recent operating experience, DOE concluded that the average financial penalty of shutting down a 1000 megawatt nuclear plant is $500,000 per day. *Id.* It concluded "[t]his is a significant sum for the consumer, particularly when the nuclear unit in question represents a large portion of the utility's generating capacity and all or most of the incremental cost is passed along to the consumer in a fuel or energy adjustment charge. The magnitude of the loss constitutes a potent argument for not delaying the startup of a nuclear unit once it is ready to operate safely and reliably." *Id.*

Any delays resulting from the Court of Appeals' decision would be in addition to those already being experienced for other reasons. For example, a DOE study of NRC licensing delays and resultant costs for 12 nuclear units owned by only a few of EEI's members estimates that even after recent NRC actions to expedite the licensing process are taken into account, there will be 51 months of delay in licensing of those units with a total direct cost of over $1 billion. Department of Energy, Division of Power Supply and Reliability, *Estimates of The Costs of Delaying Operating Licenses for Nuclear Plants* 1 (May 15, 1981). If, as a consequence of the Court of Appeals' decision, prior hearings are required for license amendments involving no significant hazards consideration, the aggregate potential delays and resultant costs for all nuclear plants owned by EEI members and for the customers they serve would be greatly increased.

B. THE COURT OF APPEALS MISINTERPRETED THE REQUIREMENTS OF SECTION 189(a) AND THE INTENT OF CONGRESS.

The decision of the Court of Appeals in this case overturned a longstanding interpretation by the Atomic Energy Commission ("the Commission")[2] of Section 189(a) of the Atomic Energy Act, as amended in 1962, Pub. L. 87-615, 76 Stat. 409 (1962), in order to implement an admittedly "paradoxical" interpretation of that provision. Utility Pet. for Certiorari, App. C at 35a n.20. Any question regarding the meaning of this provision is resolved by the legislative history of the 1962

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[2] The Atomic Energy Commission was predecessor to the Nuclear Regulatory Commission, which now has the responsibility of regulating nuclear facilities. 42 U.S.C. §5841.

amendments and related Commission actions which demonstrate that no basis exists for the interpretation adopted by the Court of Appeals.

Prior to 1960 the Commission construed Section 189(a) of the Atomic Energy Act to require hearings before approval of construction permits, operating licenses and amendments to construction permits and operating licenses. 42 U.S.C. §2239(a) (1958 ed.). By 1960 the hearing requirement had led to such delays in the administration of the amendment process that the Commission "recognize[d] the need for [an] expeditious change [*i.e.*, amendment] procedure consistent with its statutory responsibility with respect to public health and safety." Memorandum Opinion and Order of August 18, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18. Therefore, in the *Vallecitos* proceeding the Commission authorized the staff to approve a license amendment without a hearing if it "can make a finding that the proposed test or experiment presents no significant new hazards consideration." Memorandum Opinion and Order of November 2, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18, 1 A.E.C. 541 (1960).[3]

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[3] The license amendment itself read (1 A.E.C. 543):

"If the Director, Division of Licensing and Regulation determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the application, he may authorize the change, test or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. A copy of the authorization must be filed in the record of the proceeding."

result of the fourth sentence of § 189 this would mean that affected persons would, theoretically, not necessarily have prior notice of the authorization of the changes permitted under the 50.59 provisions, while the right to a requested hearing would remain unchanged. In practice however it was clear that the *Vallecitos* approach, codified in 50.59, provided both notice and opportunity for hearing. The best evidence of the NRC's practice under the *Vallecitos* decision are actions taken with respect to license amendments in the *Vallecitos* proceeding itself subsequent to the November 18, 1960 decision later codified as 50.59. For example, a September 1, 1961 license Amendment No. 17 to the Vallecitos license DPR-1 stated that,

> prior public notice of proposed issuance of this amendment is not necessary in the public interest since [it] would not present any substantial change in the hazards to the health and safety of the public . . . .
>
> In accordance with the Commission's rules of practice (10 CFR Part 2) the Commission will direct the holding of a formal hearing on the matter of issuance of the license amendment upon receipt of a request therefor from the licensee or an intervenor within 30 days after the issuance of the amendment. 26 Fed. Reg. 8469.

This administrative practice makes clear that the NRC accorded a hearing upon request after *Vallecitos* on the kinds of issues that presented no significant hazards consideration. That Congress did not "incorporate by reference" § 50.59 in its statutory scheme did not therefore mean that Congress disapproved the Commission's practices — the straw man that petitioners would set up. See U.S. Brief 34 note 27. Congress simply achieved a similar

result in a different manner. Once sentence three did away altogether with mandatory hearings past the construction permit stage, 50.59 no longer had the same pertinence to NRC proceedings that it had before the 1962 amendments and the portions relevant to this proceeding were eventually repealed.

Finally, the notion that "the court of appeals' interpretation of the legislative history . . . fails to ascribe any independent purpose or effect to the fourth sentence" of § 189 is simply absurd. See U.S. Brief 33. The Court of Appeals gave to the fourth sentence precisely the effect its words and Congress intended, i.e. to permit the NRC to waive notice and publication of amendments found to involve no significant hazards consideration. If Congress had intended to permit the NRC to deny a requested hearing as well as waive notice and publication it could easily have found the words to do so.

3. The NRC's Own Administrative Practice Does Not Support Its Denial of a Requested Hearing Prior to Taking an Irreversible Act Pursuant to a License Amendment Found By the NRC to Involve "No Significant Hazards Consideration."

Petitioners raise the issue that the "court of appeals erroneously failed to defer to the Commission's longstanding interpretation of Section 189(a)." U.S. Brief 39. However the administrative practice offered in support of this proposition simply will not bear the weight assigned to it. Petitioners rely again principally upon the *Vallecitos* decision and its codification in 50.59 which as shown above both addressed the problem of mandatory, unrequested hearings and did not at all suggest that the NRC had authority to deny requested hearings. Met Ed Brief

27. At the time of this administrative practice the only problem the NRC had encountered concerning its single contested proceeding was the NRC's own failure to provide adequate notice and hearing which, as Intervenors noted, subjected the agency to considerable attack in Congress. Met Ed Brief 13.

Aside from these two over-used props to petitioners' case, both of which actually predated the enactment of sentence four and accordingly could be of no use in discovering administrative practice under that statute, petitioners offer very little that can be considered even relevant to the interpretation of sentence four.

Intevenors cite one lonely example of pure *dicta* from an Atomic Safety and Licensing Board decision which supports the petitioners' interpretation in this case. Met Ed Brief 29-30. But this decision is simply not the practice of the Commission itself which might be deferred to by a court. Atomic Safety and Licensing Board members are selected from outside the agency and do not include members of the Commission. Cf. 10 CFR 1.11 & 2.721. They do not form a permanent administrative organ creating a body of precedent out of a coherent fund of experience, but rather are selected from a panel to sit as *ad hoc* boards constituted for particular licensing hearings. The boards are not involved in administering the statute but rather take evidence and issue decisions on technical matters. One statement, which was in fact *dicta,* from one of these part time *ad hoc* boards in 1974 is not the kind of administrative practice that might justify the NRC's unprecedented denial of a requested hearing in this case.

From the Commission itself petitioners can only offer the bare statement that "Section 189 does permit immediate effectiveness" of amendments found to involve

"no significant hazards consideration." Met Ed Brief 29. Of course this statement says no more than that prior notice may be waived when issuing an amendment pursuant to the fourth sentence of § 189. Intervenor goes on to claim that "the Commission has consistently applied its interpretation of the Act thousands of times . . . to make license amendments effective immediately without notice or opportunity for a prior hearing." Ibid. The sense in which this statement is partially true lends no support to petitioners' attempt to overturn the decision of the Court of Appeals. There is no dispute that the NRC has authority to make "license amendments effective immediately without notice." Similarly the proposition that a prior hearing may also be omitted can be made literally true if "prior" means only prior to the authorization that may be issued without notice and does not refer to the case where a hearing may have been requested. Taken in any other sense this assertion is simply untrue. Petitioners have been unable to provide any single instance before Three Mile Island where the Commission denied a hearing that had been duly requested or where request for a hearing on an irreversible action did not suspend the effectiveness of the amendment. This would be the only kind of administrative practice relevant to this case, and it simply does not exist.

Because the petitioners offer, as examples of administrative practice supportive of their attempt to overturn the Court of Appeals' decision, matters that are wholly irrelevant to the issues at stake in this case it is important, finally, to set forth very clearly just what are the areas of difference between petitioners and respondents.

Respondents clearly do not contend that where no hearing has been requested prior to the authorization of a "no significant hazards consideration" license amendment the NRC must hold a hearing prior to the authorization. But

this nevertheless apparently forms the straw man at which much of petitioners' argument is misdirected. Respondents simply contend, first, that in every case where an affected party duly requests a hearing on a license amendment a hearing cannot be denied on the grounds of a "no significant hazards consideration" finding. Numerous references to the right to some hearing in the petitioners' briefs suggests that the petitioners do not disagree with this proposition. See U.S. Brief pp. 21, 35 notes 28 ("opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission") and 29 (§ 189 fourth sentence "does not necessarily require that a hearing be held prior to action by the Commission") Met Ed Brief 16 line 4, 17 line 13, 21 lines 5-6, 25 note 21 lines 3-5. Both briefs point out that the NRC's practice is that it "remains willing to entertain requests for a hearing filed after" it issues a license amendment. U.S. Brief 40 and note 33; Met Ed Brief 29. In fact the NRC followed its practice of offering some hearing in this very case.The problem in this case is that the offer of hearing was totally meaningless because it involved actions that were irreversible and the NRC made the novel ruling that a request for a hearing would not stay the effectiveness of the amendment. Pet. 66a. There is nothing in any legislative history even suggested by petitioners or any administrative practice of any kind prior to 1980 which would authorize the NRC to issue such a ruling under any circumstances, much less where the action authorized is irreversible.

Respondents herein have recognized from the beginning that where a "no significant hazards consideration" finding is made the basis for waiving notice, and no prior request has been made for a hearing, it will not be necesary under § 189 for the NRC to hold a hearing prior to "initial action approving the amendment" by the NRC. Respondents have insisted only that a hearing on an ir-

reversible action be held on request prior to the final issuance of the amendment (after any stay) and prior to the licensee's taking any irreversible action pursuant to the amendment. Therefore it appears that the "Argument" of petitioners stated at pp. iii & 15 of the United States' Brief is in no way inconsistent with the respondents' position consistently held in the Court of Appeals and before this Court and can be easily reconciled with the Court of Appeals' holding on the facts of this case. The hearing required to be held upon request by § 189 in the case of a "no significant hazards consideration" finding may be held "after initial action approving the amendment" provided it is held prior to final issuance and effectuation of the amendment. In the case presently before this Court the NRC contemplated a hearing only after the full and irreversible effectuation of the admendment by release of radioactive materials into the environment. Such a hearing would have been nothing other than meaningless.

Petitioners attempt to explain away the absurdity of holding a hearing on an action irreversibly taken, as the NRC proposed to do in this case, with the not quite relevant observation that the "vast majority of operating license amendments are reversible." Met Ed Brief 34. While it may very well be true that "[a]mendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review," U.S. Brief 40 note 34, it is just as clear that for those albeit few cases where the action authorized by an amendment will be irreversible a hearing after effectuation of the amendment will be meaningless. This case is not one of the "vast majority" but rather involves, as conceded by petitioners (Met Ed Brief 34), an action that was irreversible. Accordingly the interesting question of whether or not a hearing on an amendment authorizing an action that is

not irreversible may be held after effectuation of the amendment is not presently before the Court on the facts of this case. The only question is whether a hearing granted after effectuation of an admittedly irreversible action is a meaningful hearing, assuming – as it appears – that petitioners concede some hearing to be required by § 189. As the Court of Appeals simply held, "§ 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement." 651 F.2d 791 note 28. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972)

4. This Court's Upholding of the Plain Meaning of § 189 So As To Accord Requested Hearings on "No Significant Hazards Consideration" Amendments Involving Irreversible Action Will Not Introduce The Overwhelming Administrative Burdens Imagined By Petitioners

Petitioners attempt to fashion a public policy argument that if § 189 is interpreted as the Court of Appeals did interpret it below to require a hearing when requested on a "no significant hazards consideration" amendment, there will as a result occur such a flood of hearing requests as to "threaten the viability of the existing system of regulation." U.S. Brief 41. With all respect, this argument is patent nonsense. Petitioners mention no requests for hearings on "no significant hazards consideration amendments" since the November 19, 1980 decision in this case. Petitioners fail to cite one instance other than this case where intervenors have ever requested a hearing on a "no significant hazards consideration" amendment, except for the *Consumers Power Co.* case where the Atomic Safety and Licensing Board found that the hazards considerations could be significant and granted a hearing, 7 AEC 297,

298 (1974). Met Ed Brief 29-30. The Court of Appeals ruling in this case has in fact been the law of the District of Columbia Circuit since the *Brooks* decision in 1973 without stirring a flood of hearing requests. Since petitioners seemingly concede that some hearing is required, just not a *prior* hearing, the grant of a meaningfully timely hearing will not require more resources but simply better planning. Finally, this case only deals with amendments involving irreversible action. Petitioners themselves concede that such amendments are relatively rare. This concession considerably deflates their assertions about the vast consequences of the decision in this case. Petitioners' argument about the dire consequences of the Court of Appeals decision simply does not hold up against actual experience or petitioners' own statements about the rarity of irreversible amendments.

Not only do the circumstances of this case – a request for a hearing on a "no significant hazards consideration" amendment which is irreversible – seldom arise, but numerous techniques exist for expediting the NRC proceedings which are in no way compromised by the Court of Appeals' decision. In any situation where the "public health, safety or interest so requires," the NRC is permitted by regulation to make a license modification effective immediately. See 10 CFR § 2.204. The NRC enforces a rigorous standing requirement for intervenors. 10 CFR § 2.714.

Hearing examiners have authority to dispose of issues on the pleadings where there is no genuine issue as to any material fact, 10 CFR § 2.749 and may otherwise expedite proceedings, e.g. 10 CFR §§ 2.757, 2.761.

The most telling reason why the fears proffered by the NRC may be substantially discounted was well stated by

then Circuit Judge Burger in the context of standing before the FCC. The following sage observation of Chief Justice Burger is equally applicable to the petitioners' "parade of fantasized horrors" in this case:

> The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966)

Petitioners' "man bites dog" report that such intervenors are going to "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both," U.S. Brief 41, strains credulity.

5. The Important Interests of Due Process and Fundamental Fairness Require That § 189 Be Strictly and Faithfully Construed to Preserve the Public's Right to a Hearing Before Suffering the Irreversible Effects of Radiation, In the Absence of Clear and Unmistakable Evidence of Congressional Intent To Deny That Right.

The public has a profound interest in NRC licensing actions. In the course of deliberation on the Atomic Energy Act, Senator Humphrey stated:

> I think it is fair to say that no single development in the nation is more public in nature than the atomic development, for it has been paid for by all the taxpayers. 100 Cong. Rec. 10730 (1954).

Because of the continuing symbiotic relationship between government and the nuclear industry (see findings of fact in *Oklahoma* v. *Bernstein,* 5 Media L. Rep. 2313 (1980)) government has more direct responsibility for injuries suffered by the public in the context of nuclear regulation than would be the case in other regulatory contexts.

Because of the peculiar nature of radiation, prior regulation to prevent releases of radiation is the chief remedy available to those subjected to its hazards. The NRC has been given vast discretion to balance risks and benefits in this area, and the procedural rights granted the public constitute the chief means by which Congress has structured the discretion it has delegated to the NRC. Although the procedural rights at stake in this case have been accorded by statute, they are of a kind traditionally considered fundamental and have been accorded a high degree of protection by this Court.

i) The hearing right denied by the NRC was essential to elemental fairness and due process for those affected by the radiation releases.

The Fifth Amendment of the United States Constitution prohibits the Federal government from depriving any person of life, liberty or property without due process of law. The intentional release of radioactive materials into the earth's atmosphere, whether from the containment building of the partially melted-down Three Mile Island reactor or from any operating power reactor, adversely affects human life, burdening the public with debilitating disease and afflicting the genetic heritage of humanity with irreversible mutations and chromosomal aberrations. The assault of radiation on the human cell is a submicroscopic event, its consequences, though serious, are remote in time and attributable to diverse possible etiologies. Accordingly, the precise causal relationship between known quantities of radioactive materials dispersed into the environment and any particular human pathology is virtually unprovable, though epidemiological, biostatistical, and public health studies are showing that the generalized effects of low level radiation are seriously underestimated by the radiological theories of the NRC.

Though the injury inflicted upon life, liberty and property interests by releases of radioactive materials into the petitioners' environment may not be easily identified to particular individuals, there is no uncertainty that life in human cells will be damaged by this radiation,[2] the liberty

[2]"[I]t is generally believed that any exposure to radiation, however small, has adverse genetic effects and those effects are cumulative." Green, Safety Determination in Nuclear Power Licensing: A Critical View," 43 Notre Dame Lawyer 633, 645 (1968).

to be free of disease may well be infringed, and nearby property values may decline as animals die and suffer injury. Meanwhile, those who evacuated their homes to avoid possible injuries are deprived of their liberty of movement and peace of mind. As the Supreme Court ruled in *Duke Power* in light of the uncertainties about its health and genetic effects, the emission of radiation itself is a cognizable present injury to these interests. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). The nature of the interests involved here, especially protection from physical assault by radiation, are profound. There are few Due Process cases that involve tort-like interferences with life and liberty interests in the physical integrity of the person because,

> prior hearings might well be dispensed with in many circumstances in which the State's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff . . . . Monaghan, "Of 'Liberty' and 'Property,'" 62 Cornell L.R. 405, 431 (1977).

However, the nature of low level radiation injuries, the long latency period and problems of proving causation all but preclude tort recovery outside the workplace, except in such an exceptional factual circumstance as was present in *Silkwood* v. *Kerr-McGee Corp.*, 585 F.Supp. 566 (W.D. Okla. 1979), virtually the sole tort recovery for radiation injury (autopsy conducted shortly after plutonium facility worker's substantial off-site contamination, which was discovered by monitors at workplace).

For infliction of physical injury by radiation, the only effective way to accord a potential radiation victim due

process is to provide access to a hearing before the injury is inflicted. In § 189 Congress has struck a delicate balance between due process and administrative efficiency that has survived unchanged since 1962 through the most active period of reactor licensing of the 1960's and 1970's. The basic procedural rights accorded by Congress cannot be eroded by administrative interpretation without raising issues of constitutional import. This Court has stated:

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

Mathews v. *Eldridge,* 424 U.S. 319, 333 (1976).

In *Greene* v. *McElroy,* 360 U.S. 474, 507-08 (1959) the Court held:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress . . . intended to afford those affected by the action the traditional safeguards of due process. (citations omitted) These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.* (emphasis added)

While injuries from non-natural low level radiation may be a novel twentieth century phenomenon, the procedural rights at stake in these cases are as ancient as the traditions of a free people. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, (1943) (Frankfurter, J.). In a government of laws the Nuclear Regulatory Commission must also be made subject to the fundamental and minimal procedural safeguards accorded by Congress to protect our traditional liberties. Not to do this much in an area frought with political controversy is to countenance and encourage the divisiveness, alienation and stress that happens

> . . . when a substantial number of people come to believe that major decisions have been made without their consent. If the social fabric is to survive, the politics of manipulation and delegation simply must be replaced by a politics of informed consent. Wright, "Beyond Discretionary Justice," 81 Yale L.J. 575, 586 (1972)

The fallout of psychological stress and alienation which resulted from the NRC's handling of the situation underlying this case is part of the record. In hearings on the cleanup, Senator Simpson, Chairman of the Senate Nuclear Regulation Subcommittee, noted, after hearing "residents of the local population around Three Mile Island," that it was reported the NRC "approach was driving them batty." J.A. 71. Senator Simpson sensed "a community which is already anxious as a result of the accident and highly skeptical of the two organizations directly involved in the cleanup; that is, the NRC and the utility. Given this situation, it seems to me prudent if not essential for the NRC to lay out in detail for full public review the standards it expects the utility to meet and the means it will

use to ensure the compliance." J.A. 72. The need for the NRC to provide a formal means of participation in decision making about the TMI-2 cleanup was made clear by two psycholoIgists. Dr. Bruce Dohrenwend, Head, Social Psychiatry Research Unit, Columbia University pointed out to the NRC prior to the venting the "local citizens needs to be informed and to participate in the decisions on atmospheric decontamination. He emphasized the relationship between information and participation and the level of psychological stress within the population." J.A. 90. Dr. Colman informed the NRC, after a sham "public meeting" where the public had no apparent means for influencing decision making but was rather designed to "sell" the public a decision already made:

> As a Psychologist I am getting scared. Those Meetings are rowdy . . . . I think unless some mechanism can be developed so the people in that area have a realistic understanding that they are gaining control over the situation there by having a clear effect on the Commission about its decision, that anger level is going to keep on going. Wherever it goes, I don't want to speculate, but it is not healthy, it is not good.

These behavioral scientists are expressing in the language of their own disciplines what is perhaps the fundamental constitutive principle of our democratic polity. As a leading Constitutional law scholar has expressed it in discussing the due process right to a prior hearing,

> rights to interchange express the elementary idea that to be a *person* rather than a *thing* is at least to be *consulted* about what is to be done with one. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 503.

ii) The public has virtually no practical recourse for protection against injurious releases of radiation upon them other than a prior NRC hearing.

The Atomic Energy Act, as amended, has placed vast powers in the hands of the five person Nuclear Regulatory Commission, an independent agency whose members are appointed to five year terms by the President with the advice and consent of the Senate, 42 U.S.C. 5841(b) and (c). The Atomic Energy Act grants the NRC broad rule-making and adjudicatory powers under "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives", *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1970)

The power granted the NRC under the Atomic Energy Act in the area of protection against radiation hazards wholly preempts the police powers of state and local governments, 42 U.S.C. 2021(k); *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971) *aff'd mem.* 405 U.S. 1035 (1972). Therefore, the public must turn to the Federal government, and, within the Federal government, to the NRC as virtually its sole source of regulatory protection against radiation hazards. Cf. *Train* v. *Colorado PIRG,* 426 U.S. 1, (1976); 42 U.S.C. 6903 (27) (1976); with 40 CFR 190.10 and 42 U.S.C. 7602(g) (Supp II, 1978).

The NRC is empowered by the "Price-Anderson Act", 42 U.S.C. 2210(e) (1976) to confer a limitation of liability on its licensees for any damages in excess of $560 million, a small fraction of the damage that could result from a nuclear accident. See *Duke Power* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, (1978). For

the more insidious and less dramatic forms of radiation injuries caused by low level radiation, problems of proof, e.g. *Mahoney* v. *United States,* 220 F.Supp. 823 (E.D. Tenn.) *aff'd* 339 F.2d 605 (6th Cir., 1964), and statutes of limitations make any hope of receiving compensation for injuries by damage suits at law highly speculative. The public is accordingly not only reliant entirely upon the NRC for its regulatory protection against radiation hazards, but it is also largely dependent upon prior regulation of hazards, as opposed to *post hoc* legal remedies for damages, as a form of protection.

Notwithstanding such a scheme which combines in a single agency vast responsibility for the welfare of the public with a unique degree of untrammeled discretion, it is nevertheless true that the remedies which the public has been given in order to keep the NRC responsible have been narrow and few. Unlike statutes such as the Clean Air Act or the Safe Drinking Water Act which permit citizens' suits, see *Susquehanna Valley Alliance* v. *Three Mile Island,* 619 F.2d 231, 242 note 12 (3rd Cir. 1980), the Atomic Energy Act does not create any general public right for enforcement of environmental standards against users of radioactive material, id. 237-39. Licensees of the NRC are entirely shielded by the Agency from any direct citizens' actions in the courts under the Atomic Energy Act. Preemption prevents the state from creating any other rights enforceable in state courts. *Pacific Legal Foundation* v. *State Energy Resources Cons. & Dev. Com.,* 472 F.Supp. 191 (S.D. Cal. 1971). To protect themselves from radiation hazards created by users of radioactive materials, the public must rely upon the NRC licensing and enforcement process. It is only in the narrow framework of the NRC's administrative proceedings that the public is granted a forum within which it may attempt

to protect its interest in health and safety. Within this context the public must conform to the rules and regulations set by the Nuclear Regulatory Commission, and may appeal the final findings and rulings of the Commission only to a Court of Appeals where those findings, rulings and interpretations are accorded favorable presumptions of accuracy, reasonability, and respect, and the scope of review and opportunity for fact-finding is narrow. See e.g. *Nader* v. *NRC,* 513 F.2d 1045, 1055-56 (D.C. Cir. 1975). The rights accorded the public by Congress in its broad delegation of power to the NRC are exceedingly narrow,encompassing only the minimal due process rights of notice, public adjudicatory hearing and participation contained in § 189. Short of electing a sympathetic president who might gradually replace the NRC Commissioners or electing a sympathetic Congress which might change the whole statutory scheme for nuclear regulation, the only remedy and protection which might be pursued by citizens, such as the petitioners, residents in the vicinity of TMI-2, who find themselves victim to the radiation hazards created by an NRC licensee, is exercise of these narrow due process rights accorded by § 189.

The authority under which the NRC exercises its discretion to determine radiation hazards and to permit degradation of the environment as a cost of producing energy, is essentially similar to the legislative provisions which Justice Rehnquist would find to

> violate the doctrine against uncanalized delegations of legislative power

in *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 672, 675 (1980).

Where standards are as loose as those provided by the Atomic Energy Act it is even more essential that all of the procedural safeguards required by Congress be strictly enforced in agency decisionmaking. *See* K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Section 3.15(b) (1978) pp. 209-11. In the present case the NRC is attempting to expand its discretion so as to weaken the most fundamental of due process safeguards which were provided by Congress as a guide to agency decision making in an area of inherent uncertainty. In lieu of providing firm standards to guide the substantive decisionmaking of the NRC, Congress at least structured agency procedure so as to assure that the NRC would take into account all available information by according the public the procedural rights of notice and hearing and participation. In light of the information presented in formal adjudicatory hearings Congress expected the NRC to develop its own precedents, standards and rules. However, in this case the NRC took its very first decision in the uncharted area of a reactor accident cleanup without according those procedural rights Congress erected to assure that decisions would be well-informed and based on all available information. While those rights cannot be restored, they may be vindicated by affirming the declaratory judgment entered by the Court of Appeals below.

CONCLUSION

There is no support in the plain meaning of § 189 of the Atomic Energy Act, in its legislative history, in administrative practice under the provision, in case precedent, or in reason for the NRC's contention that it can deny, on the basis of a "no significant hazards consideration" finding, the right of an affected person to have a duly requested hearing prior to final issuance and effectuation of a license amendment.

The judgment of the Circuit Court of Appeals for the District of Columbia, below, should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.
Petitioners,

v.

STEVEN SHOLLY et al.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

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On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

This case arose out of the 1979 accident at the Three Mile Island nuclear reactor (TMI), the first accident of its kind. The issue presented in this case is whether the Nuclear Regulatory Commission could permit release into the atmosphere of the waste radioactive materials remaining from the accident at Three Mile Island at a

rate in excess even of that permitted, though rarely experienced by, an operating reactor without providing a meaningful hearing to persons affected by the release of radiation.

An independent scientific study concluded that as a result of the release of the airborne TMI waste material into the environment, from 50 to 300 additional fatal cancers and other genetic effects will appear in the next five to 10 generations. Joint Appendix, 104.

The Nuclear Regulatory Commission (NRC) made a summary finding that the decision to release the TMI radioactive waste materials at a rate faster than that permitted an operating reactor involved "no significant hazards consideration." If supported by evidence, such a determination would have allowed the NRC, in accordance with the fourth sentence of § 189 of the Atomic Energy Act of 1954, 42 U.S.C.

§ 2239(a), to dispense with 30 days notice and publication of its decision.

Respondents challenged the NRC's "no significant hazards consideration" finding in the Court of Appeals, arguing this finding was invalid as a matter of law. See "Petition for Review of Final NRC Orders," No. 80-1691, filed June 23, 1980; "Brief for Petitioners," filed July 31, 1980, pp. 33-46; "Petitioners' Brief in Reply to Respondents," filed August 29, 1980, pp. 32-35.

After the NRC denied respondents' request for a hearing on the license amendment permitting release of radiation from TMI at an increased rate, respondent PANE petitioned the Court of Appeals to order a hearing. The NRC contended in the Court of Appeals that its finding of "no significant hazards consideration" not only allowed it to dispense with notice and publication under § 189, but, by implication, also to

dispense with a requested hearing. The NRC relied on dicta in Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084 n.36 (D.C.Cir. 1974) that "[a]n amendment can be made without an opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'"

Respondents joined to their first contention -that the NRC's action did indeed involve a significant hazards consideration- a further contention that in any event § 189 did not permit waiver of a hearing, but only waiver of notice and publication, pursuant to such a finding. See "Brief in Support of Petition to Review Final Nuclear Regulatory Commission Orders, Application for Temporary Stay and Other Relief," 80-1783, filed July 8, 1980, 12-20. The Justice Department agreed with respondents' latter contention, that § 189 would not support the NRC's argument for waiver of a hearing. See "Memorandum

of Respondent United States of America," August, 1980, pp. 4-21.

As a separate matter, respondents also argued before the Court of Appeals that the hearing required by § 189, under the circumstances of this case, would have to be a prior hearing. E.g., "Brief for Petitioners," supra, p.51 et seq. Respondents generally relied upon due process considerations reflected in the following language from Fuentes v. Shevin, 407 U.S. 67, 81 (1972):

> If the right to notice and a hearing is to serve its full purpose then, it is clear that it must be granted at a time when the deprivation can still be prevented.

Applying the due process analogy, respondents recognized that not every administrative hearing need be a prior hearing. See Arnett v. Kennedy, 416 U.S. 134 (1973). But it is clear that where an act is irreversible as here, where no important

concerns for urgent action exist, and where life and health interests are involved general due process considerations would require a prior hearing.

The Court of Appeals ruled that § 189 could not justify dispensing with a hearing altogether and also accepted respondents' argument that in this case the hearing would have to be a prior hearing. As a third matter the Court of Appeals found that the case was not moot because the agency's action in denying a hearing in these circumstances was "capable of repetition, yet evading review." 651 F.2d at 784. The Court of Appeals did not address the question whether the NRC's "no significant hazards consideration" finding was correct. 651 F.2d at 786, n.16.

I

Section 12 of Public Law No. 97-415, 96 Stat. 2067 amending § 189 did not overrule the decision of the Court of Appeals below in Sholly v. NRC, 651 F.2d 780 (1980). First, this legislation squarely rejected the NRC's position that authority to dispense with notice and publication implied a right to dispense with a hearing. Rather Congress expressly adopted the position of the Court of Appeals that a hearing is required under the clear terms of § 189. The language of the Act interpreted by the Court of Appeals has been left untouched by Congress. As stated in "Authorizing Appropriations for the Nuclear Regulatory Commission," Conference Report to Accompany H.R.2330, Rep.No. 97-884, 97th Cong., 2nd Sess. (hereafter "Conference Report"), the amendment "maintains the requirement of the current section 189a of the Atomic Energy Act that a hearing on the license amendment be held

upon the request of any person whose interest may be affected." Conference Report 37 (emphasis added).

Second, Congress cured an important defect in § 189 which was suggested in footnote 20 of the Court of Appeals' opinion, where the Court questioned, but did not answer, "whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fifth Amendment or the Administrative Procedure Act notwithstanding a finding of 'no significant hazards consideration.'" 651 F.2d at 787. By imposing new requirements for providing notice of "no significant hazards consideration" amendments, Congress expressed its "intent that, wherever practicable, the Commission should publish prior notice of, and provide for prior public comment on, such a proposed determination." Conference Report 38.

Third, Congress attempted to solve

the problem of distinguishing when a prior hearing might be waived in several ways. The new amendment lays down a general rule that pursuant to a "no significant hazards consideration" finding a prior hearing may be waived. But this authority is subject to several restrictions.

One, the NRC must consult on any "no significant hazards consideration" finding with the State in which the nuclear facility is located. §12(a)(2)(A) & (2)(C)(iii). This consultation includes prior notification of the licensee's request for such an amendment and the NRC's evaluation of it. The reasons for the proposed determination must be discussed with the State and the NRC must listen to and consider the State's comments. The NRC must make a good faith attempt to further consult before issuance of any such license amendment. Conference Report 39. While this does not provide a prior hearing, consultation with the

official local representatives of persons affected by a nuclear facility does afford some greater measure of due process rights than would the legal position advocated by the NRC before this Court.

Two, before § 12 may take effect, the NRC is required to promulgate regulations establishing standards for determining whether an amendment involves no significant hazards consideration. § 12(a)(2)(B) & 12(b). Such standards again provide a greater measure of due process protection. See generally,. K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Sec. 3.15 (1978). It is worth noting that an earlier proposed regulation, 45 Fed. Reg. 20,491-92, had no provision that would cover the instant case. It is presumed that any future regulations promulgated pursuant to this command of Congress would have greater specificity. Congress corrected one problem asserted by respondents in

this case by making clear that,

> These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations.... and should ensure that the NRC does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. Conference Report 37.

Three, Congress explained,

> the purpose of requiring prior notice and an opportunity for public comment before a license amendment may take effect, as provided in subsection (2)(C)(ii) for all but emergency situations, is to allow at least a minimum level of citizen input into the threshold question of whether the proposed license amendment involves significant health or safety issues. ...[T]he conferees expect the content, placement and timing of the notice to be reasonably caluculated to allow residents of the area surrounding the facility an adequate opportunity to formulate and submit reasoned comments." Conference Report 38.

This opportunity for reasonable notice was the principal objective of the Sholly suit.

Fourth, and most important, Congress specifically addressed the remaining issue presented by this case, that of a right to a prior hearing on license amendments involving irreversible actions. The essential question placed before the Court by this pending matter is whether an after-the-fact hearing on an irreversible action such as release of radiation satisfies either constitutional or administrative due process. See "Brief for Respondents," filed September 2, 1981, pp. 31-34. Congress addressed this specific issue as follows:

> The conferees intend that in determining whether a proposed license amendment involves no significant hazards consideration, the Commission should be especially sensitive to the issue posed by license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility or allowing a facility to operate for a period of time without full safety protections). In those cases, issuing the order in ad-

> vance of a hearing would as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. Accordingly, the conferees intend the Commission be sensitive to those license amendments which involve such irreversible consequences. Conf. Report 37-38 (emphasis added).

II

The enactment of § 12 of Pub. L. No.97-415 did not cause this action to become moot. The compliance of this litigation with the Constitution's Article III live case or controversy justiciability requirement has not been any way compromised, or even affected by, the enactment of §12. This action was not an attack on the constitutionality of a statute which has been repealed or so fundamentally altered as to cure its constitutional defect, e.g. Princeton University v. Schmid, 102 Sup.Ct. 867 (1982); Diffendorfer v. Central Baptist Church, 404 U.S. 412 (1972),

or so changed as to remove the specific complaint brought to Court by the plaintiff, Hall v. Beals, 396 U.S. 45, 48 (1969).

Here the specific complaint brought to Court by respondents (petitioners below) on behalf of the public around Three Mile Island is that the NRC intends to go forward with the clean-up of the TMI reactor in a way which would intentionally release radiation upon them, but would do so without according them a right of participation in an adjudicatory hearing on the related licensing changes. This complaint remains as strong as ever.

The Court of Appeals found that, although the specific occasion for respondents' complaint had passed, the question was representative of a greater problem which could repeat itself in the course of the clean-up and again escape review. This issue was briefed and argued below

and decided by the Court of Appeals. The Court of Appeals' decision that this case was justiciable under Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) was carefully reasoned and was not challenged before this Court.

The enactment of Pub. L. 97-415 in no way affects any of the considerations concerning mootness. The NRC is just as likely to attempt later stages of the cleanup without a prior hearing on the grounds of a "no significant hazards consideration" finding now as before. Respondents' dispute over the NRC's authority to do this is as live and real as it ever was. This case simply has not become moot as a result of enactment of a statute which may affect the outcome of the case on appeal.

While this case has not become moot, it is just as true that under long accepted precedent of this Court, Pub.L. 97-415's amendment to § 189, and its legislative

history, would now need be newly applied to the facts of this case on appeal. As stated in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282 (1969), another case where relevant new law was adopted pending appeal of the case, the "general rule ... is that an appellate court must apply the law in effect at the time it renders its decision."

Accordingly, if the Court does not dismiss its writ of certiorari, it would apply the new amendments for the first time to the facts of this case. The new amendments make two issues raised below abundantly clear, i.e. that there is 1) a right to some notice and 2) a right to an adjudicatory hearing, notwithstanding an NRC "no significant hazards consideration" finding.

As to the remaining issue of whether the hearing must be a prior hearing in the context of this case, the focus has

shifted a great deal from that which the case had in the Court of Appeals. The generalized due process considerations presented to the Court of Appeals have now been replaced by the general rule that a prior hearing is not necessary for such amendments, subject to the condition that where amendments involve irreversible consequences, the NRC should be "especially sensitive" in arriving at a "no significant hazards consideration finding." Congress' balance of priorities on this question takes fairly directly into account the facts of this case without necessarily solving the issue. Congress' approach to the issue does rely much more on the specific interpretation put on the words "no significant hazards consideration" and therefore shifts the focus of discussion away from generalized due process considerations to the meaning given these particular words.

Respondents presented to the Court of

Appeals extensive argument attacking the NRC's "no significant hazards consideration" finding as inaccurate and contrary to law. In the light of Congress' tightening up the definition of this catch phrase, previously undefined by case law or legislative history, respondents would refocus and strengthen their arguments. Because the Court of Appeals relied on more generalized due process considerations in deciding that respondents had a right to a prior hearing it was not required to address respondents' arguments attacking the NRC's "no significant hazards consideration" finding.

If the Court does not dismiss the writ of certiorari in this case, the appropriate disposition would be remand to the Court of Appeals for further briefing and decision on the issue of whether the NRC's "no significant hazards consideration" finding could be upheld and a prior hear-

ing denied under the law as newly amended. If this issue is not remanded, the Court should not decide how the new law affects this case without at least further briefing and oral argument focused on the issue.

The discussion above should make clear that this case is not moot. But, at the very least, it would be inappropriate to dispose of this case on the ground of mootness at this stage before the question has been fully briefed, and possibly argued.

III

The writ of certiorari previously granted in this case should now be dismissed. The purpose of this case was to construe the intent of Congress as to whether and when a hearing would be required on a license amendment which involved irreversible consequences but upon which the NRC had made a "no significant hazards consideration" finding.

Congress has now unqualifiedly expressed its intent, leaving no room for construction, that a hearing is required in such cases. This has reduced the importance of this case, which was never very great, and leaves for decision only the question as to when such a hearing must take place. The Court of Appeals did not dwell long on the latter question, and now Congress has provided guidance which completely changes the focus of the inquiry. As stated in a case having a similar factual background: "The focus of this lawsuit has been completely blurred" by this change in law on appeal. See Sands v. Georgia, 401 U.S. 144, 152 (1971). (As here, it was clear in Sands that the case did not become moot because of the change in law, id. 151)

In Sands the Court remanded for further proceedings in order to make a record and sharpen the issues in a manner appropriate for Supreme Court review. As

discussed above this would be a proper disposition for this case as well. But the most appropriate disposition would be to simply dismiss the writ of certiorari. Congress has now construed its own statute in light of the specific facts of the Sholly case. It has made improvements in the level of due process accorded the public. It has made an attempt at balancing diferent interests in determining hearing rights on "no significant hazards consideration" amendments. This new construction of § 189 by Congress is based squarely on the assumption that the Court of Appeals had properly construed the statute in Sholly. Congress made it clear that it intended by the new amendment of § 189 to grant "new authority" to the Commission, not to reestablish old authority mistakenly withdrawn by the Court of Appeals. See Conference Report 36; Congressional Record H8822, Dec. 2, 1982 (Rep. Udall,

House sponsor). Congress did not choose to wait for a more authoritative interpretation of the statute from this Court before acting. It accepted the Court of Appeals' construction of the statute as correct and built on that interpretation toward a new framework for accommodation of the respective interests involved.

The only remaining issue left on appeal in this case must be viewed in light of Congress' new framework for resolving when a prior hearing is required on a "no significant hazards consideration" license amendment. Because Congress has provided fresh guidance on that issue, the need for a decision by this Court to assess the intent of Congress is now less compelling than it might have been when the writ of certiorari was granted.

Proper resolution of this case under the new amendments would require a remand to the Court of Appeals. But any subse-

quent repetition of the problem presented here would also need be presented to the Court of Appeals in a new lawsuit. It would promote judicial economy to permit the Court of Appeals to measure against the Congressional language a new set of facts. It would promote judicial economy to bring this teapot tempest to an end by simply dismissing the writ of certiorari at this time on the grounds that further clarification of the law after Congress has so recently acted does not justify consumption of this Courts' parsimoniously allocated certiorari jurisdiction.

In any event this case is not yet ripe for resolution under the new law because the law will not go into effect until regulations are promulgated by the NRC. § 12 (b), Pub. L. 97- 415. Since the regulations are an integral part of the new statutory scheme this case cannot be resolved under the new law until those regulations have been promulgated.

Conclusion

Respondents oppose the Solicitor General's suggestion of mootness on the grounds of a change in law for the simple reason that the change in law has no bearing whatsoever on the question of mootness in this case. The Solicitor General has cited no case presenting similar facts where the Court has made a finding of mootness.

Cited above are several cases which were found moot under strikingly distinguishable facts, or which were not found moot under similar facts. Cases similar to this one have been remanded for further focusing of the record.

The most appropriate resolution of this case is dismissal of the writ of certiorari, since Congress has confirmed that the Court of Appeals properly construed the intent of Congress in its

decision below and application of the new law enacted by Congress in response to the decision would better await a new fact situation which might develop in light of the new law. In any event no finding of mootness should be made until that issue can be fully briefed and argued by the parties.

Respectfully submitted,

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February 11, 1983

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Nos. 80-1640 and 80-1656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITIONERS REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

Respondents' opposition to our suggestion of mootness warrants a very brief reply.

1. Contrary to respondents' contentions (Opp. 7-8), neither the newly amended Atomic Energy Act nor its legislative history reflects approval of the decision of the court of appeals. On the contrary, as explained in our suggestion of mootness, and as respondents elsewhere acknowledge (Opp. 9, 17), the Amendments make clear that the Commission may dispense with a prior hearing when an operating license amendment is determined to entail "no significant hazards consideration." Respondent stresses (Opp. 7-

13) that the new legislation refines in various respects the rule previously advocated by the Commission as a matter of interpretation of the pre-existing language of Section 189(a) of the Atomic Energy Act. But that does not alter the fact that the enactment of this legislation eliminates any remaining controversy as to the proper interpretation of the former provisions of law, and therefore renders this case moot. __/ Contrary to respondents' assertion (Opp. 24), there is ample precedent for issuance of a Munsingwear order when a controversy is overtaken by amendatory legislation. See, e.g., Chicago Board Options Exchange v. Board of Trade of Chicago, Nos. 82-327 & 82-526 (Nov. 29, 1982); State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981).

2. Contrary to respondents' suggestion, there is no occasion for this Court either to "apply the new amendments to the facts of this case" (Opp. 16) or to remand this case to the court of appeals (Opp. 18).

a. There is no reason for this Court to apply the new amendments to the facts of this case. The question whether the Commission's orders would have been upheld under the amended statute is entirely academic. No meaningful relief can now be awarded respecting the Commission's orders. No jurisdiction exists to enter such an advisory opinion.

__/ While the amended Section 189(a) does not in all respects track the Commission's contentions respecting its predecessor, the differences are the result of refinements and distinctions that are legislative in nature and would have been beyond the power of the courts to establish. In any event the amendments to Section 189(a) plainly do not adopt the court of appeals' view on the question presented: the necessity of a prior hearing. Plainly, the enactment of the "Sholly" Amendment to Section 189(a) (see H.R. Rep. No. 97-884, 97th Cong., 2d Sess. 36 (1982)) does not reflect the view that Sholly was rightly decided. See also 128 Cong. Rec. S 15314 (daily ed. Dec. 16, 1982) (remarks on the conference report of Senate Manager Senator Simpson: "The Sholly provision corrects what most all of us have viewed as an erroneous judicial interpretation of the hearing requirement for 'no significant hazards consideration' amendments by providing that no hearings in advance of these types of determinations are required"); see also 128 Cong. Rec. S 15315 (daily ed. Dec. 16, 1982) (remarks of Sen. Domenici).

This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Pet. App. 9a). As indicated in the suggestion of mootness (page 4), the recent amendments to Section 189(a) eliminate all possibility that that statutory question will reoccur. Respondent's observation (Opp. 15) that the NRC may continue to avail itself of its authority to make its "no significant hazards consideration" amendments immediately effective misses the point. The legal questions that could be raised should the Commission employ that authority in the future would be entirely different from those raised heretofore in this case. Moreover, the academic question whether the Commisison's orders in this case complied with the subsequently amended Section 189(a) would shed no light on the issues that might arise in further litigation. Thus, there is no longer any issue that is capable of repetition, yet likely to evade review.

b. There is no reason to remand this case to the court of appeals either for exploration of the validity (under the former statute or the present statute) of the Commission's "no significant hazards" finding in this case (Opp. 18-19), or for the exploration of a constitutional question that respondent intimates to be present (Opp. 5, 12). Plainly, the question whether the no significant hazards determination in this case was proper is not capable of repetition, and it does not "continue[] to affect a present interest." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-126 (1974). Accordingly, that question is moot. __/

__/ The court of appeals did not suggest that the validity of the no significant hazards determination escaped mootness under the recurring question doctrine; the court below merely held that the separate question of interpretation of Section 189(a) was not moot.

Contrary to the respondent's suggestion (Opp. 5, 12), the issue in the court of appeals was never of constitutional dimensions. Any constitutional challenge respondents might wish to mount to the newly amended statute will have to await the advent of a concrete controversy.

3. Respondents do not quarrel with our submission that this Court should not render any decision in this case and that the controversy has been robbed of all vitality (see Opp. 19-23). They nonetheless seek to avoid vacatur of the judgment of the court of appeals suggesting that our petition should merely be dismissed (Opp. 24). No precedent is cited for that disposition. And it would be inappropriate to allow the judgment of the court of appeals to stand because the Court has determined that further review is warranted in this case, but intervening circumstances have deprived petitioners of an opportunity for that review. Accordingly, this Court should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while awaiting this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the petitions for review as moot. See, e.g., Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979); United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).

The private petitioners have authorized us to state that they join in this submission.

For the reasons stated, and those previously stated in our suggestion of mootness, it is respectfully submitted that the judgment of the court of appeals should be vacated, and the case remanded with instructions to dismiss the petitions for review as moot.

REX E. LEE
Solicitor General

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RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

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RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

On February 17, 1983 the Solicitor General filed with the Court the "Petitioners Reply Memorandum in Support of Suggestion of Mootness" (Rep. Mem.). Respondents submit the following arguments in response to Petitioners' Memorandum.

1. Federal Petitioners argue that, because under the new Amendments to § 189 of the Atomic Energy Act, the "[Nuclear Regulatory] Commission may dispense with a prior hearing when an operating license amendment is determined to entail 'no significant hazards consideration,'" there can be no doubt that under the facts of this case the NRC could validly dispense with a prior hearing; and therefore, they argue, this case is moot. (Rep. Mem. 1-2)[1]

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1. Petioners quote the Senate manager of the "Sholly" amendment for the proposition that the Court of Appeals made an "erroneous judicial interpretation of the hearing requirement." (Rep. Mem. 2, note) However, a reading of the legislative history reveals that many of the supporters of the amendment were unable to distinguish between the ruling in Sholly and the possible implications of that ruling. This was not surprising inasmuch as the NRC represented to Congress, as it did to the Court below, that the Sholly decision would have dire consequences and implications which it indeed did not. Cf. "NRC Motion to Stay Issuance of Mandate,"

This argument is misplaced for two reasons. First, the Amendments do not remove doubt whether a hearing was required under the facts of this case. Rather Congress clearly suggested that a hearing is required under the circumstances of this case. See "Opposition to Federal Petitioners' Suggestion of Mootness," 12 (Opposition). Second, even if Congress did pass a law which replaced a vague rule with a rule of unmistakeable clarity, such action by Congress does not moot a case which is otherwise a live Article III "case or controversy" [2].

(footnote continued)
dated December 10, 1980 with "Petitioners' Opposition to NRC's Motion to Stay Issuance of Mandate," filed December 17, 1980. Because of this deception Congress in the end passed Pub. L. 97-415 which it thought was necessary to overturn Sholly yet did not in fact overturn the decision, but rather did no more than limit it in scope.

2. This truism might be more obvious to Petitioners were they in the position of Respondents before the Court. Surely the positioning of the parties on appeal does not affect the mootness vel non of an issue one way or the other.

Cases cited by Federal Petitioners are not to the contrary. In the Chicago Board Options Exchange v. Board of Trade of Chicago, __U.S.__ (Nov. 29, 1982) the Court of Appeals had "held that pending any future action by the Commodity Futures Trading Commission all trading of options on GNMA bonds is prohibited." (emphasis added). The holding of the Court of Appeals became moot in the Supreme Court when regulatory action satisfied the condition which qualified the holding. 677 F.2d 1137 (7th Cir. 1982). The fact that the holding became moot by its very terms when the Trading Commission acted makes the Chicago case clearly distinguishable from this case.

In State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981) a ruling became moot when the law was changed so as to make the remedy asked for in the suit unavailable.

Again, the State Fair case has no bearing on this declaratory judgment action.

2. Federal Petitioners next contend that,

> This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Rep. Mem. 3).

Federal Petitioners' interpretation of the Court of Appeals decision is simply wrong. This does not state the question decided, and determined not moot, by the Court of Appeals. Indeed, if this were the quesiton decided and determined not moot by the Court of Appeals - whether an NRC interpretation is correct or not - this would present the epitome of a case non-justiciable because it calls for an advisory opinion.

The issue presented to the Court of Appeals was adequately stated by the Court of Appeals itself in the section of its

opinion titled "Mootness," 651 F.2d at 785, where it said,

> The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative....

The issue before the Court of Appeals was not an abstract question concerning a particular interpretation of law by the NRC; it was rather the very real question of whether under the law the NRC could avoid a requested hearing on licensing action involving the release of radiation into the atmosphere. Respondents contend that the answer to that question under the Amendment is "no" just as it was under the pre-existing law.

Petitioners claim that no meaningful relief can be had in this case under the new amendment. (Rep. Mem. 3). But the only relief available under the pre-existing law was the declaratory judgment entered by the Court below. This was a

meaningful remedy precisely because it would help to prevent recurrence of the denial of a meaningful hearing under the circumstances of this case. A ruling based upon § 189 as amended would have precisely the same effect. It is just as likely now as it ever was that the NRC will attempt to use a "no significant hazards consideration" finding to deny a hearing in the circumstances of a radiation release presented by this case.

The judgment of the Court of Appeals was that "[t]he NRC's refusal to hold a hearing violated the petitioners' statutory rights." 651 F.2d at 791. This judgment is as valid now, after the enactment of the amendment, as it was before. The amendment concededly affects the reasons a Court would apply to reach this judgment; but it does not affect the judgment.

Petitioners claim that in future cases where the NRC repeats its refusal to hold a

requested hearing on licensing actions involving emissions of radioactive materials, "[t]he legal questions that could be raised ... would be entirely different from those raised heretofore in this case." (Rep. Mem. 3). This statement is simply false.

The legal question in future such cases will focus on whether the licensing action in fact does raise "significant hazards considerations" within the meaning of that phrase as newly elucidated by Congress. This precise issue was squarely put to the Court of Appeals. In their briefs below Respondents argued, in rather great detail, the proposition that the "NRC's 'no significant hazards consideration' determination is invalid both as a matter of law and as a matter of fact." "Brief of Petitioners," filed July 31, 1980, p. 17 ff. The precise arguments made there have now in fact been strengthened by the

action of Congress. See Opposition 11-12. The Court of Appeals, in light of its analysis of the plain language of § 189, simply did not deem it necessary to address this issue. 651 F.2d at 786 n.16. But before the Court of Appeals' judgment can be attacked on the grounds of mootness under the new law this issue must be resolved.

The issue involved in this case, squarely raised below, is one that will arise again in future cases. The non-compliance by the NRC with its duty to provide a hearing on this kind of licensing action, one which risks the life and health of affected persons, is fully capable of repetition. The analysis under the new law is similar to the analysis which the Court of Appeals was asked to apply to the old law, but would now be made with the benefit of important clarification by Congress favorable to the position of Respondents.

b) Petitioners contend that there would be no reason to remand this case to the Court of Appeals, as suggested by Respondents, to consider the issue presented in light of the new amendment. However, the Supreme Court has routinely held that cases on appeal are subject to the law in effect at the time of decision and that where a clearer focus of the record is required to apply that law, remand is appropriate. Opposition 15-16, 20-21

Petitioners next state that "the issue in the court of appeals was never of constitutional dimensions." (Rep. Mem. 4). This is a clear mistatement of fact belied by the record below. Respondents, in their principal brief to the Court of Appeals, argued at some length on constitutional issues, "Brief of Petitioners," 18-33, to the conclusion that "the NRC has raised serious

constitutional problems under the long dormant 'delegation of power' doctrine and under the Due Process Clause." Id. 32.

It has been possible to avoid these constitutional issues only so long as a right to hearing on licensing actions involving releases of radiation is preserved under the statute. For the very same reason that the NRC is likely to repeat the denial of hearing in these circumstances, the constitutional questions are also not moot.

3. Petitioners state that no precedent has been cited where this kind of case has been disposed of by way of dismissal of the writ of certiorari. (Rep. Mem. 4). Abundant examples exist of where the Court has dismissed the writ of certiorari because a case has lost importance while pending decision. Cf. Supreme Court Rule 19.

One way in which the Court has deemed

cases to have lost importance has been when new law vitiated the import of the question presented on certiorari.

For example, in Cook v. Hudson, 429 U.S. 165 (1976) the Court granted certiorari to consider whether the First and Fourteenth Amendments prohibited a state school board from firing teachers who sent their own children to private schools which discriminated on the basis of race. An intervening decision of the Supreme Court held that 42 U.S.C. § 1981 prohibited private schools from discriminating. This made potential application of any right the Petitioner might have established of limited importance. The Supreme Court, accordingly, dismissed the writ of certiorari; the Court did not declare the case moot. See also Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (Harlan, J., concurring) (writ of certiorari dismissed in case brought under

an Act repealed after certiorari had been granted.)

These cases, though arising under circumstances different from the instant case, show that a change of law on appeal can impair the importance of a case for purposes of certiorari jurisdiction in the Supreme Court.

4. Petitioners have used the enactment of Atomic Energy Act amendments to reargue an issue resolved in the Court of Appeals and not formally presented to this court in the petitionfor writ of certiorari. While mootness is of jurisdictional significance, this is no reason to shortcut the deliberate process of briefing and decision-making in the Supreme Court. This issue of mootness has been brought before the Court in too precipitous a fashion. See Respondents' "Application for Extension of Time To

Answer," filed January 25, 1983.

There is no urgency in this case, by consent of the parties a long-pending case before the Supreme Court, to warrant this schedule. If the Court is unable to conclude that the case has so lost importance that the writ of certiorari should be dismissed, and wishes to address the mootness question, the case should be set down for full briefing and argument on the mootness issue that has now been presented to the Court by the Petitioners.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA, *Petitioners,*
v.
STEPHEN SHOLLY, *et al., Respondents.*
METROPOLITAN EDISON COMPANY, *et al., Petitioners,*
v.
PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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METROPOLITAN EDISON COMPANY, *et al., Petitioners,*
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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent

[1] While the other parties have consented to the filing of this brief *amicus curiae,* respondents Stephen Sholly, *et al.,* have not consented to EEI's participation at this stage of the proceeding. The letters providing written consent have been filed with the Clerk of this Court.

of the nation's electricity users. EEI's members include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the Nuclear Regulatory Commission ("NRC") or for which applications for construction permits are pending.[2] In 1980 nuclear power plants produced 11 percent of the domestic electricity generated from all fuel sources by generating 251,122 million net kilowatt hours of electricity.[3] In 1979, the latest year for which figures are available, EEI member companies produced 83.7 percent, or 213,132 million net kilowatt hours, of the total nuclear power generated.[4]

As of December 31, 1979, 40,917,550 customers in 34 states were within the service areas of the EEI member utilities having operating nuclear plants and received direct benefits from the electricity they produced.[5] Customers in other areas and states received indirect benefits from these plants under regional interconnection agreements which, through regional transmission line grid systems, provide for the sale and purchase of electricity among participating utilities.

All 87 of the EEI members having an interest in operating or proposed nuclear power plants are impacted by and have an identifiable interest in the efficient and timely operation of the NRC licensing procedures. The decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals")

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[2] U.S. Nuclear Regulatory Commission, *Owners of Nuclear Power Plants,* NUREG-0327, Rev. 2 (December 1979).

[3] U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* 70 (March 1981).

[4] U.S. Nuclear Regulatory Commission, *Operating Units Status Report,* NUREG-0020, Vol. 4, No. 1 (January 1980).

[5] Edison Electric Institute, *Catalogue of Investor-Owned Electric Utility Companies Operating in the United States,* 20th Ed. (1981).

therefore involves matters of vital concern to EEI and its members. Because the interest of private electric utilities nationwide and of the millions of customers they serve is not represented by any party to this action, EEI seeks this Court's permission to represent this interest through the attached brief.

The holding below would impose substantial new administrative burdens upon the NRC by requiring the NRC to hold hearings prior to acting on requests for amendments to operating licenses which the NRC has determined involve no significant hazards consideration. The NRC's compliance with these requirements would increase the burdens on the licensees involved in obtaining license amendments which involve no significant hazards consideration. More significantly, nuclear power plants might have to shut down or a scheduled shutdown might be prolonged pending completion of the hearing mandated by the Court of Appeals' decision even though such a hearing will provide little offsetting benefit to public health and safety. In addition, in order to hold the required hearings the NRC would have to divert limited administrative and staff resources from other proceedings involving more significant issues. This would in turn delay those proceedings and increase, without commensurate public benefit, the time and expense of obtaining construction permits, operating licenses and significant amendments to operating licenses and subject consumers of electricity across the nation to potential billions of dollars of additional costs resulting from additional delays.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The attached brief *amicus curiae* sets forth detailed factual information regarding the administration of the NRC licensing process to provide a

broader perspective for this case and to demonstrate that the Court of Appeals' decision improperly imposes substantial and unjustified procedural requirements upon the NRC.

CONCLUSION

For the reasons set forth above, and in the attached brief, EEI urges this Court to grant its Motion for Leave to File the attached brief as *amicus curiae.*

Respectfully submitted,

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PEOPLE AGAINST NUCLEAR ENERGY, *et al., Respondents.*

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitioners, the United States Nuclear Regulatory Commission ("NRC") and the United States of America ("Government Petitioners") and the Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petitioners"), in this case. Petitioners and EEI urge this Court to reverse a holding of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that the NRC must hold a prior hearing on any nuclear power plant operating license amendment upon the request of an interested party even though the amendment has been determined by NRC to involve no significant hazards consideration. Utility Pet. for Certiorari, App.C.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and 77.1 percent of the nation's electricity users. EEI's member companies include 87 companies having an interest in nuclear power plants for which construction permits or operating licenses have been issued by the NRC or for which applications for construction permits are pending. As discussed in the foregoing Motion for Leave to File, the decision of the Court of Appeals concerns matters of vital importance to EEI and its members regarding the efficient and practical administration of NRC's regulation of the construction and operation of nuclear power plants.

SUMMARY OF ARGUMENT

1. The Atomic Energy Act imposes extensive administrative responsibilities upon the NRC to require the safe construction and operation of nuclear power plants. Before the NRC can approve construction of a nuclear power plant it must conduct an adjudicatory hearing which thoroughly investigates all necessary considerations, including health and safety issues, and must separately analyze the environmental impacts of the proposed plant. The NRC must conduct an additional hearing prior to approval of an operating license for a nuclear power plant, if requested. Thus, by the time an operating license is issued, the NRC will have thoroughly considered all relevant health and safety considerations raised by interested parties.

An operating license is a complex document which sets forth many detailed terms, conditions and specifica-

tions which frequently require modification. The NRC expects to complete action on 2,500 license amendments in fiscal 1981. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Upon request, the NRC will hold hearings prior to approval of significant amendments to operating licenses.

Before the decision of the Court of Appeals, the NRC approved without a prior hearing license amendments which it determined involved no significant hazards consideration, provided that notice of approval was published in the *Federal Register*. The public was permitted to request a hearing subsequent to such approval. In making the decision which amendments qualified for such treatment the NRC was guided by several criteria developed during years of consistent administrative practice.

The average time necessary to obtain a construction permit or operating license is over three years. The record developed during initial hearings addresses numerous complex technical issues and is extremely large. NRC's Atomic Safety and Licensing Board Panel, which hears and resolves the issues raised at these hearings, is understaffed and is straining its resources to consider the 42 proceedings the NRC anticipates will be heard this year. It will be unable to handle properly a significant number of new cases.

The NRC has on the average approved approximately 400 license amendments with no significant hazards consideration during each of the past four years. If hearings are held as a result of the decision below for only a small proportion of these amendments, the entire NRC hearing process could be disrupted and delays as long as nine months for each such license amendment could occur. This could force or

prolong many plant shutdowns. The additional staff responsibilities could also delay hearings which consider significant issues regarding construction permits, operating licenses and significant license amendments. The shutdown of nuclear power plants would require the expenditure of hundreds of thousands of dollars per day per plant for replacement power and the incremental cost of such power would be borne eventually by consumers throughout the country.

The opinion below thus threatens to disrupt substantially the NRC's ability to carry out important statutory responsibilities and to increase the cost of power throughout the country with little commensurate benefit to public health and safety.

2. The Court of Appeals adopted an admittedly "paradoxical" construction of Section 189(a) of the Atomic Energy Act, as amended. This contravenes the fundamental rule that anamolous or absurd statutory construction is to be avoided. *In Re Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978).

Any potential question regarding the meaning of Section 189(a) is resolved by its legislative history and the Commission's longstanding interpretation. The relevant language of Section 189(a) had been adopted in 1962 shortly after the Commission implemented, first by adjudication and then by rulemaking, a procedure which permitted the staff to identify and approve insignificant license amendments without prior notice or hearing. *General Electric Co., (Vallecitos Boiling Water Reactor)* 1 A.E.C. 541 (1960); 27 *Fed. Reg.* 5491 (June 9, 1962). The Joint Committee Report regarding the 1962 amendments demonstrates congressional awareness of the Commission's regulation expediting the approval of insignificant amendments, with no express or implied

rejection of this approach. S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). The Report also emphasizes the goal of expediting the licensing process. *Id.* Accordingly, it is reasonable to conclude that Congress intended to affirm the Commission's practice of screening out insignificant cases from those eligible for a prior hearing. The legislative history certainly does not show that Congress expressly intended a "paradoxical" statutory scheme that would be either ineffective or favor those few with preferential access to the Commission.

Moreover, within a few months after the passage of these amendments the Commission adopted regulations which reaffirmed its prior procedure for approval of insignificant license amendments. 27 *Fed. Reg.* 12184 (December 8, 1962). The procedures established in these regulations had been in effect for almost 20 years prior to the decision below. Such contemporaneous and longstanding interpretation deserves considerable deference from this Court. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.,* _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981).

Since the Court of Appeals' interpretation of Section 189(a) is erroneous, and since that Court may not impose procedural requirements upon the Commission in excess of the *minima* required by statute, its decision must be reversed.

ARGUMENT

A. THE COURT OF APPEALS' DECISION IMPOSES PROCEDURES WHICH WILL DELAY SUBSTANTIALLY THE NRC's ADMINISTRATIVE PROCESS WITHOUT COMMENSURATE JUSTIFICATION.

In order to assist this Court in its review of the decision of the Court of Appeals, it is helpful to reiterate the procedures the NRC currently applies in regulating nuclear power plant construction and operation. These procedures were succinctly described by this Court in its decision in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526-527 (1978):

> Under the Atomic Energy Act of 1954 . . . as amended . . . the Atomic Energy Commission[2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. . . . In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. . . . This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application. . . .[3] The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA) . . . and prepares a draft environmental impact statement, which, after being circulated for comment . . . is revised and becomes

a final environmental impact statement. . . . Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing . . . and reaches a decision which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. . . . The final agency decision may be appealed to the courts of appeals. . . . The same sort of process occurs when the utility applies for a license to operate the plant . . . except that a hearing need only be held in contested cases and may be limited to the matters in controversy.[5] (citations and footnote omitted)

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[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974. . . . Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards."

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. . . . The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit.

Thus, by the time an operating license is issued, the NRC will have held at least one adjudicatory hearing and may have held a second hearing addressing public health and safety issues relevant to constructing and operating a particular nuclear power plant.

The operating license is a complex document containing detailed terms, conditions and technical specifications which can run to hundreds of pages in a

typical license. Utility Pet. for Certiorari, App. F at 62a, Boyd Aff. para. 4. Because of their technical detail and scope, operating licenses and technical specifications frequently require modification. Any change to an operating license including technical specifications, no matter how minor, requires an amendment to the operating license. 10 C.F.R. §50.59(a)(1)(c).

Under Section 189(a) of the Act, 42 U.S.C. §2239(a), license amendments which involve significant new hazards consideration may be granted without a hearing following thirty days notice in the *Federal Register.*[1] If a hearing is requested, however, it must be held prior to approval of such amendments. *Id.* Prior to the decision of the Court of Appeals below, the NRC had interpreted Section 189(a) to provide that a license amendment which it determined involved no significant hazards consideration could be approved without a prior hearing (10 C.F.R. §50.58(b)) and simply published notice of approval in the *Federal Register.* The NRC had stated that it retains administrative discretion to provide a hearing before acting on such amendments. 45 *Fed. Reg.* 20491, 20492 (March 28, 1980). Members of the public who requested a hearing would have received one after approval of the amendment. Government Pet. for Certiorari at 16.

The NRC is currently proposing to amend its regulations to specify criteria to be used to determine whether a license amendment involves no significant hazards consideration. 45 *Fed. Reg.* 20491. This proposal indicates that in the past the NRC staff was guided by the following examples of amendments that

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[1] Section 189(a) is set forth in page 2 of the Petition for a Writ of Certiorari of the Utility Petitioners.

were not likely to involve significant hazards consideration (*id.* at 20492):

(i) A purely administrative change to technical specifications; for example, a change to the Definitions Sections, correction of an error, or a change in nomenclature.

(ii) A change that constitutes an additional limitation, restriction, or control not presently included in the technical specifications; for example a more stringent surveillance requirement.

(iii) For a nuclear power reactor, a change resulting from a nuclear reactor core reloading if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and such methods previously have been found acceptable by the NRC.

(iv) A relief granted upon demonstration of acceptable operation from an operating restriction that was imposed because acceptable operation was not yet demonstrated.

(v) A relief granted upon satisfactory completion of construction from an operating restriction that was imposed because the facility construction was not yet completed satisfactorily.

(vi) A change which either increases the probability or consequences of a previously analyzed accident or reduces a safety margin but for which the results of the change are within regulation acceptance criteria; for example resulting from the application of a small refinement of a previously used calculational model or design method.

(vii) A change to make a license conform to changes in the regulations.

(viii) An extension of the date, in a construction permit, for the completion of construction.

Under these examples, operating licenses were routinely amended whenever a nuclear power plant changed its fuel supply to accommodate minor technical differences in fuel characteristics and to enable a plant to conform to new regulations, such as those the NRC recently promulgated imposing additional fire safety measures (45 *Fed. Reg.* 76602 (November 19, 1980)). Other examples of no significant hazards consideration amendments are identified in our Brief *Amicus Curiae* In Support of A Petition for a Writ of Certiorari. EEI Brief *Amicus Curiae* Re Pet. for Certiorari at 6.

The NRC Notice of Proposed Rulemaking also identifies the following examples as license amendments the staff has considered likely to involve significant hazards consideration (45 *Fed. Reg.* 20492):

(i) A significant relaxation of the criteria used to establish safety limits.

(ii) A significant relaxation of the bases for limiting safety system settings or limiting conditions for operation.

(iii) A significant relaxation in limiting conditions for operation not accompanied by compensatory changes, conditions, or actions that maintain a commensurate level of safety.

(iv) Renewal of an operating license.

(v) For a nuclear reactor, an increase in authorized maximum core power level not previously publicly noticed.

(vi) A change to technical specifications involving a significant unreviewed safety question.

NRC has regularly provided notice and an opportunity for a public hearing prior to approval of these and similar amendments.

The procedures for granting construction permits, operating licenses and amendments to operating licenses impose substantial administrative responsibilities upon the NRC. As this Court noted in *Vermont Yankee,* each adjudicatory hearing is conducted by a three-member board of the Atomic Safety and Licensing Board Panel ("ASLBP"). 42 U.S.C. §2241. As of September 30, 1980, the ASLBP consisted of 52 individuals, only 13 of whom are permanent members. Nuclear Regulatory Commission, *1980 Annual Report* at 234. These members include 17 lawyers, 17 environmental scientists, 10 engineers, 6 physicists, 1 economist and 1 chemist. *Id.* According to the Commission, a board generally consists of a lawyer-chairman, a nuclear engineer or reactor physicist and an environmental scientist. *Id.* A hearing before a board is generally divided into two separate phases, one to consider health, safety, common defense and security issues and the other to consider en-

vironmental factors. 10 C.F.R. §2761a. Separate decisions may be issued for each phase. *Id.* In addition, antitrust issues are heard and decided by a separate board.

As of December 31, 1980, there were 68 nuclear plants licensed to operate, 82 plants with construction permits, 2 plants licensed for low power operations and 11 plants under review for construction permits. Nuclear Regulatory Commission, *1980 Annual Report* at 5. Construction permit hearings must be held for the 11 plants under review for construction permits and licensing hearings would be held, if requested, prior to issuance of operating licenses for these plants and the additional 84 plants with construction permits or low power licenses. License amendments will be filed on a frequent basis for all plants in operation. During fiscal 1980 approximately 1,900 amendments to operating licenses were reviewed and processed. Nuclear Regulatory Commission, *1980 Annual Report* at 5. NRC expects to complete 2,500 such actions in fiscal 1981. *Id.*

According to the Chief Administrative Judge of the Atomic Safety Licensing Board Panel, as of February 25, 1981, the ASLBP reported 62 active proceedings on its docket of which 42 could go to hearing within a year. *Energy and Water Development Appropriations for 1982*: Hearings before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations, 97th Cong., 1st Sess. 883 (1981) (Memorandum to Commissioners of the NRC from B. Paul Cotter, Jr., Chief Administrative Judge, ASLBP (February 25, 1981)) (hereafter *Appropriations Hearings*). The Department of Energy estimates that it takes eleven years from initial planning until commercial operation of a nuclear power plant. Department of Energy, Energy Information Administration, *Nuclear Power Regulation* at 6 (May 1980). The complexity of the licensing process is a major

factor in this long lead time. The average time between applying for a construction permit and the initial decision by the ASLBP board is in excess of three years. *Id.* The time necessary for granting an operating license takes another three years or more. *Id.* The length of this process is caused by several factors including the presence of many parties, the difficulty of scheduling hearings to accommodate ASLBP members and interested parties, and the complexity of the issues involved. One recent case, involving Pilgrim Nuclear Power Station, Unit 2, required 66 days of hearings during which 12,000 pages of testimony, often involving very complex issues, and 128 exhibits, several hundred pages long, were obtained. *Appropriations Hearings* at 886. The briefs and proposed findings of the parties totalled 800 more pages. *Id.* The board was required to review and reach a decision on 56 issues and contentions raised during this process. *Id.* at 887. It held 12 conferences over 20 days to discuss these issues and required substantial additional time to study, summarize and index the record and write an opinion. *Id.* at 888-889. Conferences and drafting of an opinion are often delayed because board members are hearing other cases while a decision in one case is being prepared. *Id.* at 889. The Chief Administrative Judge concluded that the ASLBP is presently understaffed (*id.* at 886) and does not have adequate resources to handle properly any significant number of new cases (*id.* at 893).

Since staff resources are already strained and contribute to delays in the scheduling and resolution of hearings, the addition of a significant number of hearings on no significant hazards consideration amendments would cause substantial additional delays. The extent to which the Court of Appeals' decision will

stimulate such hearings is, of course, still speculative. Nevertheless, the potential for additional hearings is obvious. In the past four years the NRC has approved more than 1600 operating license amendments that it determined raised no significant hazards consideration. Government Pet. for Certiorari at 15. As the statement of four judges of the Court of Appeals objecting to denial of rehearing *en banc* points out (Utility Pet. for Certiorari, App. A at 13a), under the decision of the Court of Appeals below, "almost any expression of interest" in the licensing and operation of a nuclear power plant by a member of the public constitutes a "request" for a hearing and "the NRC will rarely be able confidently to dispense with a hearing on a licensing amendment." Consequently, where continuing interest exists, the NRC may feel required to schedule hearings even though no formal request has been made. At any rate, a simple request from an interested party would necessitate a hearing before such an amendment is approved.

By one estimate the expected delay in processing a no significant hazards consideration operating license amendment attributable to a *Sholly* hearing would be at least nine months. Utility Pet. for Certiorari at 15. Depending on the nature of the amendment, such delay on an amendment determined to involve no significant hazards consideration could force an operating plant to shut down, prolong the scheduled shutdown of a plant or force it to operate at reduced power for months. The NRC has stated to Congress that "[o]ver the past few months some 20 of the nation's 72 nuclear power plants would either have had to shut down or operate at reduced power if they had not been accorded the authority sought in license amendment requests that involved no significant hazards considerations." *Appropriations Hearings* at 1110 (Response to Questions

Submitted to NRC). The additional staff responsibilities for hearings on such amendments could also delay consideration of construction permits, operating licenses and significant amendments as well. The NRC has predicted that the decision of the Court of Appeals raises "the prospect of a substantial curtailment of nuclear power plant operations for reasons which, in the Commission's view, are unrelated to the safety of the nuclear power plants." *Id.*

While absolute quantification of the impact of the Court of Appeals' decision on delays in the NRC licensing process is not feasible at this time, there should be little doubt that the financial costs upon electric utilities and their customers will be very large. The Department of Energy ("DOE") recently stated that the incremental cost of replacing nuclear power generation lost by reasons of licensing delays varies anywhere from $100,000 to $750,000 per day. U.S. Department of Energy, Office of Nuclear Reactor Programs, *Update, Nuclear Power Program Information and Data* 60 (January/February 1981). This variation exists because companies which can obtain substitute electricity generated from expensive oil generally experience higher replacement costs than those firms which rely upon coal as their replacement fuel. Based upon recent operating experience, DOE concluded that the average financial penalty of shutting down a 1000 megawatt nuclear plant is $500,000 per day. *Id.* It concluded "[t]his is a significant sum for the consumer, particularly when the nuclear unit in question represents a large portion of the utility's generating capacity and all or most of the incremental cost is passed along to the consumer in a fuel or energy adjustment charge. The magnitude of the loss constitutes a potent argument for not delaying the startup of a nuclear unit once it is ready to operate safely and reliably." *Id.*

Any delays resulting from the Court of Appeals' decision would be in addition to those already being experienced for other reasons. For example, a DOE study of NRC licensing delays and resultant costs for 12 nuclear units owned by only a few of EEI's members estimates that even after recent NRC actions to expedite the licensing process are taken into account, there will be 51 months of delay in licensing of those units with a total direct cost of over $1 billion. Department of Energy, Division of Power Supply and Reliability, *Estimates of The Costs of Delaying Operating Licenses for Nuclear Plants* 1 (May 15, 1981). If, as a consequence of the Court of Appeals' decision, prior hearings are required for license amendments involving no significant hazards consideration, the aggregate potential delays and resultant costs for all nuclear plants owned by EEI members and for the customers they serve would be greatly increased.

B. THE COURT OF APPEALS MISINTERPRETED THE REQUIREMENTS OF SECTION 189(a) AND THE INTENT OF CONGRESS.

The decision of the Court of Appeals in this case overturned a longstanding interpretation by the Atomic Energy Commission ("the Commission")[2] of Section 189(a) of the Atomic Energy Act, as amended in 1962, Pub. L. 87-615, 76 Stat. 409 (1962), in order to implement an admittedly "paradoxical" interpretation of that provision. Utility Pet. for Certiorari, App. C at 35a n.20. Any question regarding the meaning of this provision is resolved by the legislative history of the 1962

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[2] The Atomic Energy Commission was predecessor to the Nuclear Regulatory Commission, which now has the responsibility of regulating nuclear facilities. 42 U.S.C. §5841.

amendments and related Commission actions which demonstrate that no basis exists for the interpretation adopted by the Court of Appeals.

Prior to 1960 the Commission construed Section 189(a) of the Atomic Energy Act to require hearings before approval of construction permits, operating licenses and amendments to construction permits and operating licenses. 42 U.S.C. §2239(a) (1958 ed.). By 1960 the hearing requirement had led to such delays in the administration of the amendment process that the Commission "recognize[d] the need for [an] expeditious change [*i.e.*, amendment] procedure consistent with its statutory responsibility with respect to public health and safety." Memorandum Opinion and Order of August 18, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18. Therefore, in the *Vallecitos* proceeding the Commission authorized the staff to approve a license amendment without a hearing if it "can make a finding that the proposed test or experiment presents no significant new hazards consideration." Memorandum Opinion and Order of November 2, 1960, *General Electric Co., (Vallecitos Boiling Water Reactor)* Docket No. 50-18, 1 A.E.C. 541 (1960).[3]

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[3] The license amendment itself read (1 A.E.C. 543):

"If the Director, Division of Licensing and Regulation determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the application, he may authorize the change, test or experiment upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. A copy of the authorization must be filed in the record of the proceeding."

Shortly thereafter, a 1961 report of the staff of the Joint Committee on Atomic Energy which reviewed and made recommendations on improving the AEC regulatory process, approved of the *Vallecitos* approach and characterized it as a "step forward" in the administration of license amendment procedures. Joint Committee on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process,* Vol. I, 37 (1961). In the context of describing functions for a recommended Atomic Safety and Licensing Board, which would determine whether license amendments raised significant hazards consideration, the report stated: "[t]he handling of changes would be facilitated if the Commission's recent order in the Vallecitos case could be broadened by statute or regulation to a general rule." *Id.* at 73 n.4.

In 1961, the Commission, acting in accordance with the Joint Committee recommendation, proposed to amend its regulations to adopt the *Vallecitos* approach of permitting the staff to approve no significant hazards consideration amendments summarily and provided the public an opportunity to comment upon the proposal. 26 *Fed. Reg.* 3930 (April 8, 1961). The Commission subsequently adopted this proposal by amending its regulations. 27 *Fed. Reg.* 5491, 5492 (June 9, 1962), codified at 10 C.F.R. §50.59(e)(2).[4]

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[4] This section read in pertinent part: "[i]f the Commission determines that the proposed change, test or experiment *does not present significant hazards considerations* not described or implicit in the hazards summary report, it may authorize such change, test or experiment, without referral to the Advisory Committee on Reactor Safeguards for a report *and without a prior public hearing*, upon finding that there is reasonable assurance that the health and safety of the public will not be endangered." 10 C.F.R. §50.59(e)(2), 27 *Fed. Reg.* at 5493 (emphasis added).

The preamble to the final rule noted that the Commission planned to delegate authority to the staff to determine whether a proposed change involved a significant hazards consideration. 27 *Fed. Reg.* at 5492. Where it did not, such change was authorized without a prior public hearing. *Id.* The Commission noted that "[t]he revisions for §§50.36 and 50.59 are based upon the provisions incorporated in License No. DPR-1 pursuant to the Commission's Memorandum and Order dated November 2, 1960 (*in the matter of General Electric, Vallecitos Boiling Water Reactor,* Docket No. 50-18)." *Id.*

The 1962 amendments to Section 189(a) were adopted on August 29, 1962, two months after the Commission's codification of the *Vallecitos* approach in its regulations. Pub.L. 87-615, 76 Stat. 409 (1962). These amendments resulted in large part from the recommendations of the Joint Committee Report, *Improving the AEC Regulatory Process*, that measures be taken to reduce delays in the administrative process. The Joint Committee Report on the amendments stated that "[t]he staff study also recommended a number of procedural changes designed to decrease the number of hearings and referrals to the Advisory Committee on Reactor Safeguards." S. Rep. No. 1677, 87th Cong., 2d Sess. 2 (1962).[5] The Joint Committee Report also indicated that the amendments to Section 189(a) were intended to "relax" the mandatory hearing requirement and, in the only section of the Report which refers to the

[5] Since the Joint Committee on Atomic Energy reported these amendments, the House Report is identical with the Senate Report. *See*, H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962).

AEC regulations codifying the *Vallecitos* approach, summarized their requirements:

> Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59. Id.* at 8 (emphasis added).

As we have indicated, "AEC Regulation 50.59" provided that a license amendment which "does not present significant hazards consideration" may be approved "without a prior public hearing." 10 C.F.R. §50.59(e)(2), 27 *Fed. Reg.* 5493. The Joint Committee Report discussion demonstrates congressional awareness of the regulation codifying the *Vallecitos* approach. Moreover, the Report, which does not suggest any implied or express rejection of this approach, emphasizes the goal of expediting the hearing process which is furthered by the *Vallecitos* approach.

This Court's responsibility is to interpret the words of the Act in light of purposes Congress sought to serve. *Chapman* v. *Houston Welfare Rights Organization,* _____ U.S. _____, 99 S.Ct. 1905, 1911 (1979). Here, it is reasonable to conclude on the basis of the legislative history that the congressional goal of expediting the hearing process would be furthered if the Commission were permitted to screen out insignificant cases from

those eligible for a prior hearing.[6] Such a construction is completely consistent with the 1962 amendments and their legislative history.

In addition, construction of a statute which would produce an anomalous or absurd result is to be avoided. *In Re Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). The interpretation of Section 189(a), as amended, by the Court of Appeals leads to an absurd result. Even that Court conceded "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" and concluded that its interpretation of the statute produces a "paradoxical" result. Utility Pet. for Certiorari, App. C at 35a n.20. This statutory scheme would either be ineffective or at most would be utilized by those select few with preferential access to the Commission. Since the legislative history does not show that Congress intended such a "paradoxical" and absurd statutory scheme, the Court of Appeals' interpretation should be reversed by this Court.

Within a few months after passage of the 1962 amendments the Commission proposed regulations to

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[6] This Court has often recognized that even when a statute requires a "hearing" or "opportunity for a hearing" it is reasonable for administrative agencies to establish criteria which screen out insignificant cases in order to administer their statutory responsibilities more efficiently and to focus available resources on priority concerns. *Costle* v. *Pacific Legal Foundation*, _____ U.S. _____, 100 S.Ct. 1095, 1106 (1980); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620 (1973); *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The fact that the screening procedure at issue in this case differs in some respects from those adopted by other agencies in no way detracts from the reasonableness of adopting screening procedures to facilitate efficient agency administration.

implement those amendments. 27 *Fed. Reg.* 10706 (November 2, 1962). In the preamble to the proposed regulations the Commission gave its contemporaneous interpretation of the congressional amendments to the Act:

> Public Law 87-615 of the 87th Congress, which became law on August 29, 1962, adopted certain amendments of the Atomic Energy Act of 1954 designed to permit greater flexibility and to encourage informality in the conduct of licensing proceedings conducted by the AEC.
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> * * *
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> Section 2 of Public Law 87-615 amended subsection 189(a) of the Atomic Energy Act, which previously required a public hearing prior to granting a construction permit as well as prior to granting an operating license for a power or testing reactor, by limiting the mandatory hearing requirement to the construction permit stage. The amended subsection 189(a) now authorizes the Commission also to dispense with advance public notice with respect to an amendment of a construction permit or an operating license on determining that the amendment involves no significant hazards considerations, and in other cases to issue an operating license or amendment to a construction permit or operating license without a hearing but on public notice of its intent to do so. *Id.* at 10706.

The proposed regulations incorporated in a new Section 50.58(b) of the Commission's regulations that a no significant hazards consideration amendment would be approved without prior notice and publication. *Id.* at 10707. The public, including members of Congress, had an opportunity to contest this interpretation during the comment period, but the Commission's preamble to the final regulations does not contain any mention of critical

comments. 27 *Fed. Reg.* 12184 (December 8, 1962). The proposed rules were promulgated as final regulations and the Commission staff continued to approve insignificant license amendments without prior notice or hearing. *Id.* Accordingly, the Commission has twice conducted rulemakings on this subject; Congress was aware of the Commission's initial rule when it amended Section 189(a) in 1962 and the Commission's subsequent rulemaking clearly affirmed the procedures it had adopted earlier.

Those regulations had remained in effect for almost 20 years until this case arose. As the agency charged with the administration of the Act, the Commission is entitled to considerable deference. *Power Reactor Development Co.* v. *Electricians,* 367 U.S. 396, 408 (1961); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978). In addition, the Commission's contemporaneous construction of the amendments deserves special deference because it remained consistent over such a long period of time. *Equal Employment Opportunity Commission* v. *Associated Dry Goods Corp.*, _____ U.S. _____, 101 S.Ct. 817, 823 n.17 (1981). The fact that Congress made no attempt to modify the Commission's interpretation, despite numerous opportunities offered by oversight hearings, subsequent amendments to the Atomic Energy Act, and other congressional review mechanisms, further confirms that the Commission's construction and application of Section 189(a) is consistent with the intent of Congress.

The applicable rules of statutory construction and the history and implementation of Section 189(a), as amended, thus demonstrate that the Court of Appeals' interpretation of that provision is erroneous. Since that

Court may not alternatively impose additional procedural requirements upon the Commission in excess of the *minima* required by statute, *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra.* at 543, its decision must be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully requests this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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